Case and Comment
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What Determines the "Fair Value" of A Public Utility Property

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IN A SHORT article such as this, I shall of necessity be limited to presenting merely a general view of the complicated subject under discussion. I shall, however, attempt to direct attention to some fundamental considerations which are largely determinative of the problems involved, but which are too often overlooked by courts and commissions.

In order properly to understand the correct basis for valuation of public utility property for rate fixing purposes, it is necessary to have in mind the nature of the public utility and the warrant for its regulation.

Ever since the dawn of civilization, some form of regulation has been found necessary. The right to private property has always been a modified right. The same is true as regards the right to liberty and all other rights enjoyed by members of socitey. Always the maxim, *Sic utere tuo ut alienum non lædas,* has limited every right under organized government. Only in utter loneliness may one possess perfect liberty. With association springs up relationship, and relationship which requires control by an agency not a party to such relationship. Always the determination of what use of one's rights is a use in derogation of the rights of another is a question of fact, and a question of fact that cannot and must not be decided by the parties interested. For if this is not true, manifestly the stronger will uniformly oppress the weaker until he begins to do so under a claim of right so to do. Hence, government has in the past, and does now, assert the right to intervene when the relationship of parties dealing with each other is such that the one may take advantage of the necessities of the other to exact more than is his due; that is, more than that to which his contribution to the result entitles him. Thus, in all cases of monopoly or other form of unequal dealing, the right of organized society to regulate is undoubted. And this right to regulate is not in favor of the agency regulated, but of the patrons of such agency. I do not mean to say that the rights of the regulated should not be respected. But I do assert that it is not the rights of the regulated that are endangered, and that thereby

give warrant for regulation, but the rights of the patrons of such regulated industry. The theory upon which regulation is legally justified is that the industry to be regulated is more than able to take care of itself.

A public utility is, to at least a part of its patrons, essentially a monopoly, and this fact warrants its regulation. A peculiar mistake growing out of the practice of too blindly following what is thought to be precedent is responsible for the *dictum* of many state and some Federal courts to the effect that the public has an interest analogous to a property interest in the property of the utility, and that it is only by an act of dedication on the part of the owner of such property that it becomes subject to regulation. Most frequently is this doctrine found in irrigation and similar cases. This mistake arises from a misinterpretation of some of the language of the Munn Case. (Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.) The court there quotes Lord Chief Justice Hale to the effect that when private property is "affected with a public interest it ceases to be *juris privati* only," and goes on to state that the public has such an interest in the use of the property of the warehousemen there involved that such property became subject to regulation.

Ostensibly based on this decision, many decisions have been rendered to the effect that public utility corporations have granted to the public an interest in their property so that essentially the relation of principal and agent exists between such utility and the public. From this doctrine it necessarily follows that if the warrant to regulate grows out of a dedication by the owner, and a grant by him of an interest in his property, in the absence of such grant there can be no regulation. Hence, affirmative action on the part of the one owning the property is necessary before regulation is justified. This doctrine is seen to be untenable when we merely read the Munn Case. There the facts show that the warehousemen whose business was found, under the facts existing, to be subject to regulation, had been conducting their business without any franchise and with no dedication. In fact it was strongly urged that this business was purely private, and so not subject to state control. In the face of these facts, the court said: "It (the business) presents, therefore, a case for the application of a long known and well established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. *There is no attempt to compel these owners to grant the public an interest in their property,* but to declare their obligations if they use it in this particular manner." (Italics mine.)

The fact that the business was, as the court said, a "virtual monopoly," was the determining factor which was responsible for the "public interest" which justified the regulation, and not any dedication or exercise of a franchise, for in this case, as already stated, there was a distinct disavowal on the part of the owners of any dedication to the public use, and no franchise had been granted by any public authority to the warehousemen found subject to regulation.

It is plain, therefore, that the law of the Munn Case is that the nature of the business, not the desire or intent of the owner of the property, determines the status of the enterprise, and gives warrant for the regulation. The doctrine of this case has been in no wise changed by the Supreme Court of the United States, and to-day a utility is subject to regulation primarily because of its monopolistic character and the fact that, if unchecked, it will take more than it should from its patrons; and whenever the proper legislative authority declares an agency a public utility, and subject to regulation as to its rates and service, such determination will not be disturbed by the courts when a condition of monopoly is found to exist.

Since utilities are essentially monopolies in character, and hence may be legally deprived of the right to say to whom and for what price they may sell their commodities or perform their services, how then, in determining their rates, shall we determine the value of such properties? How determine the value of a property devoted to a business which is a monopoly? Before taking up these questions, it is well to see what view the

Supreme Court of the United States has expressed in the decided cases. I limit the discussion to this court because the question will always arise under the 14th Amendment of the Federal Constitution, and fortunately we may be spared the necessity of analyzing the many and conflicting state and lower Federal court decisions.

It is unnecessary to review a great number of cases to reach a conclusion as to the position of the Supreme Court on this subject. In fact a consideration of but five important cases will definitely disclose the court's mind. These cases are: Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034, 18 L.R.A.(N.S.) 1134; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 33 Sup. Ct. Rep. 729, 48 L.R.A.(N.S.) 1151.

The original and leading case is Smyth v. Ames. There the Supreme Court affirmed a decree of the lower court holding certain railway rates established by the legislature of Nebraska confiscatory. In announcing the decision, Mr. Justice Harlan said: "We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present, as compared with the original, cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case."

He then continues as follows: "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

This doctrine announced in the Ames Case has not been changed in any of the later cases. It has been specifically stated that the present value, and not some value in the past, is to be considered in fixing the rates. In the Minnesota Rate Case decided in 1913, Judge Hughes, speaking for the court, took occasion to disapprove the reproduction theory of value there urged upon the court. He pointed out the impossibility of imagining the property out of existence and at the same time conceiving the same conditions that exist while the property exists.

In none of these cases has the Supreme Court attempted to define value. Always its meaning apparently is assumed. And right here comes the fundamental fallacy that confuses all of us. *Value has no place in a rate fixing inquiry.* And I here definitely assert that in no rate case decided by the Supreme Court is there any definition of the term "value" for rate fixing purposes, nor is there any conclusion announced which requires value as ordinarily understood to be considered at all in a rate fixing inquiry where a public utility is concerned. I have already pointed out the nature of the public utility, and have shown the justification for its regulation to be the fact that if those in control of such property are permitted to take all that can be extorted from their patrons, they will take more than justice permits. The very function of regulation is to destroy value, or rather to prevent value from coming into being, that without regulation would inevitably be. If I have the only supply of water in a desert, and am permitted to take from every thirsty, desert-worn traveler all he will give for a drink, many in their desperation will give all of which they are at the time possessed, rather than suffer to the next desert well with the chance of perishing. Under such conditions I might take from my extortion, say, $20,-

000 per year, which is 10 per cent on $200,000, and if I knew my business was likely to be permanent, the value of my well to me is at least $200,000. But who would urge that organized society has not the right to check me, and say monopoly shall not be used as an instrument of extortion? And who would question the right of government to say: "Monopoly shall not be used to fix a value beyond what in justice and equity you should receive, measured by your sacrifice and your contribution to the beneficial result?" So again I say, regulation which has for its warrant monopoly has for its function the destruction of value as commercially understood. Justice Field in the Munn Case clearly saw this, and dissented on this very ground in a strong opinion. He said: "The doctrine of the state court, that no one is deprived of his property within the meaning of the constitutional inhibition, so long as he retains its title and possession, and the doctrine of this court, that whenever one's property is used in such a manner as to affect the community at large, it becomes by that fact clothed with a public interest, and ceases to be *juris privati* only, appear to me to destroy, for all useful purposes, the efficacy of the constitutional guaranty. All that is beneficial in property arises from its use and the fruits of that use; and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. If the constitutional guaranty extends no further than to prevent a deprivation of title and possession, and allows a deprivation of use and the fruits of that use, it does not merit the econiums it has received."

The learned justice has plainly and squarely stated the fact that must be understood. There is absolutely no difference between cutting down the earning power of a property 25 per cent, and taking away one fourth of such property from the owner, so far as beneficial results are concerned. And when government reduces rates, government by so much destroys value to the owner. But Justice Field overlooked the fact that government may do this, and in fact must do so if it satisfies the needs of government, where monopoly is found to exist. And he further overlooks the fact that not only in equity, but from the strictest legal considerations, government is warranted in so doing.

I have referred herein to value as commercially understood, for I have in mind the two conceptions of value; the one determined by the power in exchange of the article in question, the other determined by the cost to produce (not reproduce) the article. That value as power in exchange cannot have any place in a rate fixing inquiry is, of course, self-evident, and it was so held in the Minnesota Rate Case. For the power in exchange when referred to money is the market value, and such value is determined by the earning power of the property, which earning power is determined by the rates. Thus, we find ourselves in a circle, and are forced to reject the market value as even an element in determining the fair value for rate fixing purposes. The theory that the value of an article is determined by what it has cost to produce it is also not the meaning which the court would attach to "fair value," for the court has specifically disclaimed any such meaning in the cases cited, although it has stated that this is an element to be considered. That a third and somewhat different conception, that value is the value in use or use value, must be rejected in this inquiry, is evident from a little analysis. For use value, while coming most nearly to the definition of the word based on its derivation, is always directly comparative to some other use, while market value is indirectly comparative to some other use, with money as the medium of comparison. Thus, value in exchange and value in use are both at bottom but comparative, and never ultimate.

The utility owner clamors always for the same treatment in valuation cases as is accorded to owners of property in competitive and unregulated industry, but his clamor is as vain as the cry of the child for the moon. Not that there should be any disposition on the part of government to treat such owner differently, but it is utterly impossible to find the value of his property by the same rules as may be applied to property engaged in competitive industry. The tendency under

competition is to take the minimum which may be taken and the business be supported. This is due to the fact that if the competition be actual, the patron may avoid extortion by going to another in the same line of business, and the natural selfish inclination of the owner of property in competitive industry is to limit his profits, and in such business the natural tendency of prices is toward the actual cost of doing the business. Hence, the competition and the natural inclination of the owners of such property cause the market price to be determined by earnings that bear a close relationship to the actual cost of doing the business. Hence, such market price, as a rule, represents the "fair value" of such property, for it bears a proper relationship to the sacrifice made by such owner. But in the noncompetitive industry, in which class the public utility falls, the tendency is uniformly directly opposite to that under competition. Therefore, the regulation is justified from the very necessity of preventing the application of the same rules of value as may fairly be applied to a competitive business.

Recognizing in part this difficulty, utility lawyers and engineers have hit upon the reproduction theory of value as the proper compromise which will most nearly give to them that which the law says they must not take. This theory proceeds upon the assumption that the value of the property is to be determined by finding what it would cost under present conditions to construct another property exactly like the one in question, and bring it to exactly the same condition as regards earning, cost of operation, etc. This, as was said by Justice Hughes in the Minnesota Rate Case, is a purely conjectured method, and assumes conditions that never have existed, and which never can be shown will exist. It is impossible to imagine the railroad or gas property out of existence, and at the same time conceive the same conditions existing as are found to exist with such property in place. But if we analyze this theory closely, we shall find it is based on competition where no competition can be. It is reasoned that the public ought to pay in rates on a valuation which would be found by taking each item of property and each parcel of land, and placing a price on them which would be the price that it would cost now to acquire such items of property under the conditions that now exist, many of which conditions are the direct result of the existence of the very property in question, as a monopoly. The price of a loaf of bread in one bake shop is fixed largely by the price of a similar loaf of bread in another and neighboring bake shop. So, quite properly, we may say to Baker Jones, "Sell me a loaf for 10 cents, for if you do not, I can purchase it from Baker Smith for that sum if he has it on hand, and if he does not have it baked, he will bake it for me at that price." But you can never say this of the public utility, either as to its entire property or the separate items thereof, any more than of its product, for no other such property exists, and the very existence of this one tends to determine the amount that is asked under this reproduction method for this very property. If you conceive another, you not only think away your monopoly and do away with your necessity for regulation, but you, at the same time, divide up the business of the existing utility, and devote twice as much property to the business, with no change in the number of patrons.

This matter has become complicated merely because we have failed to recognize that there are no fixed rules for equity. We have lost sight of the fact that equity exists to take care of those cases where fixed rules fail. We have failed to remember that "ought" implies ethical considerations. When government has found an agency occupying such a relationship to society that government is justified in saying, "No longer shall you take all you can get. Hereafter you shall be limited to what you ought to take," government has assumed the function of determining the "ought," and of necessity of determining it in each individual case on the facts of such case, and with a view of giving the owner of the property involved what such owner ought to have, measured primarily by what he has sacrificed for the public interest. Necessarily the discretion to determine what ought

to be done is a large one, but a public officer or tribunal actuated solely by a desire to act fairly, if possessed of sufficient ability and knowledge, should have small difficulty in determining the right. Unless such determination is so plainly an abuse of discretion as to work an injustice, the courts will not disturb it. But in reaching their conclusion, the courts too must be guided by no fixed rules applicable to all cases, but solely and alone should their determination be whether the compensation or the rates allowed bear the proper relation to the sacrifice made by the owners of the property in view of all the facts.

And this is the only method, in my opinion, of arriving at "fair value," which the courts of necessity have never defined. For if they had attempted to define the term, they would have been required to lay down rules which we have just pointed out, from the very nature of the subject, must not and cannot be done. Hence, the highest court of the nation has contented itself with pointing to certain things that *ought* to be considered. It has also indicated that certain other things should have no bearing. But the court has not assumed to say what relative weight should be given to each element to be considered.

We see then that in no proper sense is the thing we seek value at all, but rather the just amount upon which, in view of all the circumstances, an earning *ought* to be allowed. Value as something beneficial to the owner of the property which always results from what the property will produce—what it will do for him—can only be determined after our problem is solved and the earning determined. Necessarily then, confusion must result if we attempt to find, while solving our problem, something that cannot be determined until our problem has been solved. What we seek can only be found, as all things in the realm of the ought must be determined here on earth, by the exercise of discretion on the part of some tribunal desiring absolutely to do right, and having sufficient knowledge of the subject to make it humanly probable that it will with reasonable certainty reach the proper conclusion. But with the determination of such a tribunal, in which the final authority is lodged, we must, of course, be content. But such tribunal cannot and must not, if the very warrant for regulation is to continue, be subject to fixed rules of more than the most general application in arriving at its conclusion. The primary object is to prevent monopoly *regulated* from taking what monopoly *unregulated* could force its patrons to give, and the authority empowered to determine should always have in mind first of all what the agency to be regulated has sacrificed for the public good. With this in mind, no great harm can come to the agency regulated, and the public will not be required to pay more than it ought for its service. For who will say that the public ought not to recompense the owner of public utility property for that which such owner has in good faith sacrificed, and who can say that such recompense is not fair to the owner of such property?

John M Eshleman

The Supreme Court of the United States

BY HARVEY D. JACOB

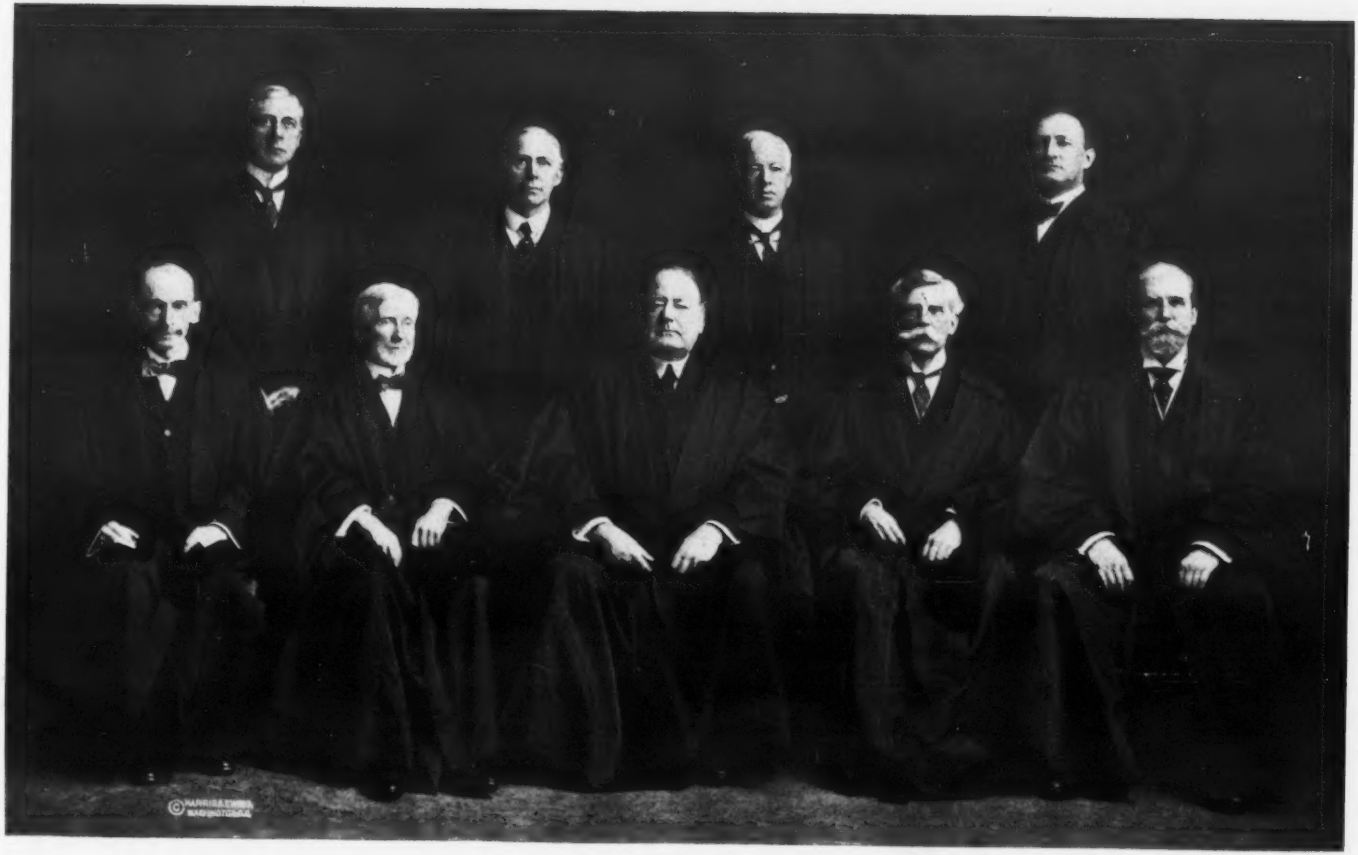
Of the District of Columbia Bar

AM directed to announce the opinion of the court in No. 10,-185, Paul Hollister v. William Wadsworth." How often have you been before that court of all courts and heard those words, little thinking of the many things occurring between the time a case is argued or submitted on briefs and the day when a justice of the Supreme Court of the United States may thus preface an opinion?

Sometimes we see criticism of decisions, and sometimes lawyers, after a hasty examination, wonder how the decision was arrived at; but when the method of disposing of cases is understood, it is easy to perceive how and why the court quietly and soberly goes about its work year by year enjoying the respect and confidence of the general public.

Though its members are of this political faith or that, matters little, for, once appointed and confirmed, their tenure of office is "during good behavior," and they are beyond the influence of persons or politics of any denomination. Thus, it is that the members of the court act independently with a sole regard to their oaths, and influenced only by that innerman who doubtless is ever at hand, and ever inquiring as to how the trust placed in their hands by this great American public is being performed and preserved. Let us then consider the manner of fulfilment of this trust and the process of disposing of the many cases arising under the Constitution and laws of the United States, and involving the lives, the liberties, and the properties of our people.

The term of the court, beginning in October and ending usually in June, is divided into argument and recess sessions, beginning with an argument session of some four or five weeks, then a recess of two or three weeks, another argument session, and so on through the term. During the argument sessions, passing by preliminary motions and the detail work of the court incident thereto, cases are either orally argued or submitted. Matter it not which, when preparation for a decision is under way, the same amount of work and study is indulged in. In both argued and submitted cases the records and briefs are printed, and at the conclusion of each day's work (and the court sits five days a week) a set of the records and briefs of that day's cases is carried to each justice's house. Singularly enough, they have no offices save those set apart in their own residences. The court adjourns each day at thirty minutes after 4 o'clock, but that in no sense means the end of the day's work,—oh no, more nearly its beginning, —for upon reaching his home each justice finds the records and briefs awaiting him. The submitted cases must be studied and worked out, for to-morrow is another day, and there are more to come. And, then, a case may have been argued, indeed argued by as good a lawyer as the world ever knew, but that alone does not convince the justice; it simply aids him to convince himself, and an independent personal investigation is made just as in the submitted cases. This preparation for consultation and decision means work and hard work. It is not the exception for a justice to be at his desk until late at night and again very early in the morning. That necessity, perhaps, furnishes a very good rea-



THE PRESENT SUPREME COURT OF THE UNITED STATES

son why the Supreme Court has never asked for other offices.

The court meets each day at 12 o'clock, and at that time the work of preparation must cease, for new cases must be heard and others submitted; but at the end of each day's sittings the study and investigation are resumed, so that by the time Saturday arrives, and usually Saturday is the day set apart for consultation, each justice is prepared to meet his associates and to discuss and thresh out the many intricate and important questions up for decision. Should a justice be not ready in a particular case, should the question be so complicated as to make the time for preparation inadequate, that case is passed until another conference day. All the business of the court is handled through the conference,—motions to advance, petitions for rehearing, etc., heading the list, and the cases argued or submitted, usually in the order received, concluding it. The list is called, and as each case is reached thereon, a discussion of its various phases is indulged in, after which a vote is taken and the case decided in accordance with the majority view. Considering the individual preparation of each justice and the open discussion in conference of each case, and indeed each point thereof, it is not easy to see how anything can escape the court, whether or not it be mentioned in argument or brief. Thus it is that the court often saves a litigant from the negligence or ignorance of a careless lawyer. An observer of the proceedings in sessions when cases are being argued would probably say to lawyers: Do not ever appear before the court unless fully prepared to present your case. Bear in mind that the justices are men of great skill and intelligence, as well as of long experience on both bench and bar. If you are not up to the minute respecting the particular merits of your case and also the general law governing the propositions advanced the questions asked will prove very embarrassing.

But back to the conference. It goes without saying that cases cannot be decided in a minute, or even in their order. As a general proposition no case comes to the Supreme Court of the United States save one in which the best judges and the best lawyers of the country have failed to agree, and it is therefore not so very remarkable after all that the justices are not always unanimous. They are not dealing with easy cases, for such cases seldom go beyond other courts. The difficult ones are the cases which are brought up for review. When a decision cannot be reached in one conference the case is passed on to the next, and in the interim each justice studies more and works harder, feeling perhaps that he might be in the wrong, or, if satisfied that he is right, endeavoring to reinforce his views with reasons which will appeal to his brethren. No doubt, decisions by a divided court are as distasteful to the court as they are to the public, but when we recall that they are brought about by honest and studious effort to do what is right as each justice's conscience and his understanding of the law and our system of government dictate, who can but admire the endeavor though it fails of unanimous result? It is indeed unfortunate that all decisions of this great court cannot be unanimous, but, like all governmental institutions guided by human judgment and human hand, there is and is likely always to be diversity of opinion.

When a decision is reached no one but the court knows it. Its announcement to the public is postponed until the opinion has been prepared. The entire court participates in the decision of a case, while the opinion is written by an individual justice, although the entire court or a majority thereof finally agree. Therefore, after cases are decided they are allotted or distributed for opinions. This distribution is made by the chief justice. Allotments are not made in rotation nor is there any fixed rule governing them, the greatest consideration perhaps being to as near as possible equalize the work. Of course, the opinion of the court is always written by a justice agreeing with the majority on the particular case.

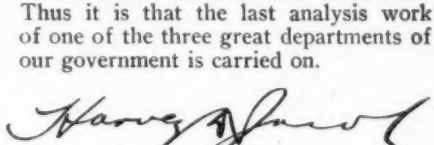
After cases have been decided and allotted for opinions, perhaps then the hardest work occurs. It is one thing to investigate and study out a proposition to the point of being able to state and decide it, but quite another when you

come to set down the reasons for such a decision, and that in such manner as to leave no adverse argument unanswered, keeping in harmony with former opinions, and not anticipating those to come in the future. Just so much, no more, no less,—that's the point to which the greatest effort must be directed.

So much of the time of the argument sessions that the court is not actually sitting is taken up with consultation preparation that, generally speaking, few opinions are written during that period. Therefore, the occasional recesses are not vacations for fishing or golf expeditions, but are the times when the justices, secluded in the quiet of their studies, work out their opinions.

And how is an opinion "constructed?" "Constructed" is apt, for opinions are built up in much the same manner as one would plan out and erect a house. The means employed are in some respects different, but the general process and the finished article very much the same. Of course, the justices have assistance,—in several instances, however, very little. Congress calls the "assistance," "stenographic clerks," and pays them accordingly, while the justices refer to the gentlemen as "secretaries." As a matter of fact, the duties of these young men are just about as varied and varying as are the tastes and temperaments of the justices. Some are of real value and assist materially in running down cases, and gathering data for the justice's consideration, use, or rejection. Usually the period lapsing between the decision of a case and the writing of the opinion, and the many questions arising in the interim tending to put the issues of that case out of mind, make it necessary to start anew with the study, after which the construction of the opinion begins. The foundation is laid by a concise and accurate statement of the facts and the questions involved. Then come the orderly development of these propositions and the conclusions of the court, based upon analogy to former decisions and the application of logic and reason in the light of the Constitution and the laws and treaties of Congress. Sometimes the work is tedious and the progress is slow, but eventually there is manuscript ready for the printer's first proof. Taking this proof as a basis, the questions are again gone over, studied, and wherever possible the opinion improved upon. When the justice to whom the case is allotted is satisfied with the opinion he has prepared, printed proof is sent to his associates, who read and study it, and make such suggestions as to substance or verbiage as appear proper, after which the copy is returned to the justice from whom it originated. The latter may accept or reject the suggestions, but if they be of a serious nature, and he does not choose to accept them, then the court must decide in conference whether the matter shall or shall not be incorporated. For this reason, all opinions go back to conference before they are handed down, and must be passed by a majority of the court. If a justice agrees with the majority opinion, but also thinks that the decision should be placed upon other or additional grounds to those incorporated therein, he may write a concurring opinion setting forth his views. Should he be unable to agree with the majority, and think his reasons for such disagreement sufficiently important, he may write a dissenting opinion. Sometimes decisions are by a divided court though there be no dissenting opinion, the dissenting justices contenting themselves with a notation of their dissent at the conclusion of the majority opinion.

Usually opinions are prepared very much like briefs and other important legal documents, the justices dictating to their secretaries and the latter transcribing his notes upon the typewriter. This is the ordinary method, but there are some of the justices who write out most of their opinions in longhand, and it is said that all do so at times, especially if the case be one requiring unusual care in the statement of what is decided. Thus it is that the last analysis work of one of the three great departments of our government is carried on.



Overcapitalization of Public Utilities

BY C. A. REYNOLDS

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LORD Chief Justice Hale, in a treatise written over two hundred years ago, said: "If the King or subject have a public wharf unto which all persons that come to that port must come and unload or load their goods as for the purpose, because they are the wharfs only licensed by the Queen, or because there is no other wharf in that port; as it may fall out where a port is newly erected, in that case, there cannot be taken arbitrary and excessixe duties for cranage, wharfage, etc.; neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by *King's license or charter*. For now the wharf and crane and other convenience are affected with a public interest."

Your attention is called to the language "though settled by the King's license or charter," for it appears that even in those days the right of the public to reasonable and moderate duties and charges was paramount.

The language of Lord Hale was adopted and followed by the Supreme Court of the United States in 1876, when Chief Justice Waite said: "Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control."

Regulation therefore is not of recent origin. It has come down to us with our laws, and whether we agree as to the method of regulation, the right to regulate is a settled fact in the laws of our country.

During the early history of our country, we had not so much need of regulation. And yet the bankruptcy of the Confederation because of a failure to regulate commerce and utilities engaged in commerce between the states is familiar history. The movement which eventuated in the formation of the Republic, as we now know it, as a fact grew out of the public need of exercising efficient control over utility corporations.

In a transcript of record in the archives of the Public Service Commission of Washington is to be found the following testimony:

Q. After constructing the line, to whom did you turn over the property?

A. To the railway company.

Q. And as compensation what was received in exchange?

A. Thirty thousand in bonds and thirty thousand in common stock of the company.

Q. Per mile of road?

A. Yes, sir. This road cost $25,000 per mile to build.

The foregoing is from the records of the Public Service Commission of Washington. Here is a railroad which cost only $25,000 per mile, and yet which has been capitalized at $60,000 per mile, by an issue of stocks and bonds. It is not an isolated case. Many similar cases could be cited. To pay dividends—to create a sinking fund to take care of its bonds and pay interest—is a problem that is facing many utilities in this coun-

try. Without honest regulation, this might be accomplished; with honest regulation, it is impossible.

The rule of valuation laid down by the courts is that the utility is entitled to receive a reasonable return upon the fair value of the property used and useful in the service of the public at the time of valuation. A limitation is placed upon this rule in that the rate must be reasonable to the public in any event.

The strict enforcement of this rule means receiverships and readjustment for many utilities. We are facing this situation in many of our cities and probably in many states. The question that now confronts the commission and the courts is: Shall the situation be met by allowing for hypothetical outlays, such as "bond discount," "franchise value," "going concern value," etc., as a basis for valuation, so as to permit a return sufficient to meet the situation, or shall we force these utilities into the hands of a receiver, and thus compel readjustment? The interest on bonds must be paid, stockholders are demanding dividends, and the operators are using every endeavor to force a return sufficient to satisfy both. The operators may do this without regulation,—with honest regulation it is impossible. Necessity is the mother of invention, and the new elements of valuation constantly appearing to plague the commissions and the courts are the result of this serious situation. In order to meet interest and dividends, a fictitious valuation must be created. A utility heavily loaded with debt cannot pay dividends under regulation, nor can it ever hope to retire its bonds. The very facts of the situation preclude it. You can appreciate the situation of a utility under regulation, and probably look upon its efforts to accomplish the impossible with some degree of sympathy.

But it is not the utility alone whose rights are to be considered. The public is in no sense a party to the wrong that created the present situation, and its rights are at all times paramount.

When we increase the so-called "fair value" by allowing fictitious elements of valuation, we are simply placing an additional tax upon the public; the public must bear the burden of a private wrong, committed perhaps many years ago, by men who now have not the slightest interest in the situation. The present owners of these utilities purchased the stock they now hold probably at face value, without investigation, and are but just learning the truth. Nearly every investigation discloses the situation. What course shall we pursue? Shall we meet the situation face to face and throw the doors wide to the fullest publicity, or shall we, by subterfuge, the recognition of elements of valuation that have no logical or just existence in fact, cover up the truth and postpone the day of final adjustment? Shall we find two dollars in value where there is in truth but one, and thus require the public to assume the debt and pay the interest of overcapitalization, or shall we force readjustment as a public right?

It is a simple question of who shall bear the burden. Our courts have declined to recognize capitalization as a basis of rate making. Shall we by indirection accomplish this result? If the former method is pursued, public regulation is a failure and a fraud; if the latter course is pursued, while many of us will suffer temporary loss, while the investors in securities that have no basis of value must lose, and present condemnation by them and the utilities must result, still, in the final analysis, regulation will be justified, our consciences will be clear, and our judgment vindicated.

Our attention is called to the fact that the stock of these utilities is held by widows, orphans, and other innocent purchasers, and it is suggested that rather than injure them we should become a party to the fraud. It is the public we are required to protect, and while all persons who have not been fairly dealt with elicit our sympathy, we have no option in the matter, nor right to fasten the burden of unsuspecting credulity upon the public.

Again we are told that to enforce the rules laid down by the courts means that future investment in public utilities in the state of Washington is impossible. We do not believe this. The placing of Washington securities on an honest basis will not keep one honest dollar out of

the state. The other kind of money is more a menace than an asset.

If the public can be educated up to the character and importance of the kind of work public utility commissions are seeking to do, and can be given a fair idea of the gravity of the situation which now confronts these regulative and corrective bodies, the whole problem would be greatly simplified, and the solution might be easy, gradual, and without serious injury to any of the large interests involved. At once it must be realized by thoughtful men that we cannot squeeze all the wind and water out of all corporate values in the country without inviting an economic upheaval of gigantic proportions. In a very real sense we have built our commercial and industrial fabric upon a basis inherently unsound from the standpoint of honest economics, and, in many vital particulars, positively indefensible from the standpoint of business morality. The condition of the patient will justify us in a resort to the knife, but the operation is of such delicacy that we must do it with a surgeon's rather than with a butcher's weapon.

Meanwhile we must take into the reckoning all the elements and forces which may tend to make the course we are to pursue as easy and safe as it is possible to make it. A thing of first importance will be to put the public into full possession of all the facts. It is no slander of popular intelligence to say that the American people do not now fully understand the American economic situation in its relation to the duties which they exact of public service commissions. They expect these commissions to keep the rates and charges of public utility corporations within the reasonable bounds of fairness and justice; but they have no more than a vague conception of the supreme and staggering difficulties which beset these regulative bodies when they come to search out a basis in value for a fair, reasonable, and just rate.

For one thing, too many complexities enter into valuation methods. Engineers and accountants have become rather too expert in marshaling facts and figures in support of wholly or partially fictitious elements of value. They have even gone to the limit of insisting that deficits due, in some instances, to a combination of corporate profligacy and mismanagement, are assets which rate makers are urged to take into account for rate making purposes.

These refinements in valuation proceedings have not only deluged the country with a vast variety of contradictory and irreconcilable court and commission decisions, but they have forced public thought completely out of the orbit of sanity, and so cumbered and confused our regulative machinery as greatly to impair its working efficiency. The condition is not wholly without elements of alarm, and we should face it with sobriety and firmness, and with a determination to rid our business fabric of elements of danger which may at any time force it into a vortex of financial disaster and civil and social chaos.

C. A. Reynolds

The Real Parties in Interest in Public Utility Regulation

BY H. ALEXANDER SMITH

Of the Colorado Springs (Colo.) Bar

RIOR to the year 1907, when the Wisconsin and New York laws providing for the regulation of public utilities other than railroads were enacted, it can hardly be said that the United States had entered upon the era of public utility regulation. It is true that the Interstate Commerce Commission was well established, and that there were railroad commissions in the various states dealing with railroad problems only; it is also true that Massachusetts had done some pioneer work in the regulation of other classes of utilities, but the widespread demand for general regulation that now exists did not gain impetus until the year mentioned. Between 1907 and the present time, the policy of intrastate commission regulation of public utilities other than railroads has spread to over thirty states of the Union, including the District of Columbia, and it can be confidently predicted that within the next few years we shall see commissions with general powers in the majority, if not all, of the remaining states.

While it is possible that the new Federal trade commission act may indicate a tendency toward a new conception of the kinds of business enterprises that are properly subject to governmental regulation, nevertheless, looking at past history, regulation has in general been limited to the class of enterprises designated as public utilities. The accepted justification for their regulation is that they are affected with a public interest, are granted certain special privileges, as, for example, the right to use the public streets and the power of eminent domain; that they correspondingly owe the public certain special duties, and that, as they usually are, and of their nature ought to be, monopolies, in order to prevent waste, such as the duplication of facilities, opportunities for evil exist which should be subject to restraint in order to prevent abuses.

In the progressive development of the regulation idea, it became obvious that, rather than force the unnatural corrective of competition in a field where competition often was unsound economically, the prevention of abuses by regulation was a justifiable and desirable alternative. Up to the present time, in spite of its defects, commission regulation has accomplished much, and its promise for the future is the brightest.

In a few instances the regulative commissions, when first established, appeared to incline toward the view that their duties were limited to securing for utility consumers the lowest rates the courts would permit, and to preventing discrimination and other abuses. As the work of these commissions advanced, however, it was soon recognized that such a policy tended to work against the best constructive welfare of the commonwealths in which the commissions were operating, and the need of making provision for the development of local resources also appeared as an important objective in the commissions' minds.

A recital of these tendencies naturally leads to an investigation of the reasons for the apparent broadened perspective which is now taken by substantially all the commissions in the country. The answer would seem to be that there has been a dawning recognition on the part of the public at large, and, following the public, by the commissions, of the real parties in interest in the regulation idea,

and of their relative importance. Let us consider, then, who the various parties are in a normal public utility situation. In this connection we are to assume an enterprise which is sound in conception, which can be given a capable management, and we are also to assume normal labor conditions. The fact that the enterprise is established in corporate form has no significance for this discussion, because the corporate form is merely a means to accomplish the ends that all parties interested desire.

In the first place, the promoter conceives the idea that a given product can be manufactured in a given locality and can be marketed there at a profit. Under the designation of promoter we include, of course, such engineers, lawyers, experts, etc., as may be employed to express the conception in concrete form. The second party appearing is the banker, including in this designation his staff of assistants, etc. The banker is the middleman between the promoter and the capital which must be enticed in order to make the scheme possible at all. The third party is the investor, whose money must be obtained. Fourth and lastly, the consumer of the product must be found, because no enterprise can be successful without a market for what it puts forth.

Considering these four parties from the standpoint of factors required for success, it is apparent that the last two, the investor and the consumer, are the fundamentally essential ones. Every enterprise, to succeed, must have these two elements. If they are supplied, all the other elements follow naturally. To obtain capital, investors who have funds to invest must be interested, and to be interested they must be promised some reasonable protection for their investment, and, in addition, a satisfactory return for their money. To market a product, consumers thereof must be found, and they must be satisfied after they have begun to use the product. The consumer wants and must have protection against the abuses of monopoly. What he is buying is electric light or gas for his house, power for his factory, street lighting, street railway service, telephones, and the like, and in all these things his desire is for efficient and sufficient service, now and in future, at reasonable rates. To obtain these for him was recognized from the start as a proper function of the regulating commission. In order to get him any service at all, however, the commissions soon realized that some consideration would have to be given to the investor with capital. The investor wants, first of all, safety for his principal, and, secondly, a return for his money commensurate with the returns that he might receive under similar circumstances and conditions in other lines of endeavor.

Our courts, since the beginning of commission regulation, have well established the principle that the property of the investor cannot be confiscated either under the respective state Constitutions or under the Constitution of the United States. Mere protection from technical confiscation, however, is far from being an inducement to place money in any line of business, particularly if the risks in the early stages are substantial. The movement of capital into one line of industry or another is not determined by whether or not the capital invested is safe from confiscation at the hands of the government or its agents. It is to be assumed that so far as governmental interference goes, there will be no confiscation. The question that will determine the flow of capital is whether this particular enterprise is attractive as compared with some other particular enterprise, and by such questions as whether a particular class of enterprises in a given section of the country are as attractive as the same class in another section, because of the particular local governmental policy. The line of confiscation, which may be designated as "the commission deadline," has no relation whatever to the economic principles of the supply and demand of capital and of competition therefor, and as a test for practical use by commissions in fixing rates, it is obsolete and generally so recognized.

There now appears to be a growing appreciation among commissions of the fact that the jurisdiction within which they exercise their authority is and must be, because of economic laws,

tion in the country for the supply of the necessary capital for development. From the standpoint of the consumer, who was formerly the only party considered by some commissions, the practical appreciation of this truth is very material, because he is affected by anything that affects the investor and the supply of capital. He desires efficient service and a low price. He wants both, but if the utility lacks funds for proper upkeep and its service suffers, he soon feels that service is to be preferred to minimum rates. As his business grows, he needs assurance that his new construction will be connected promptly and supplied with regularity, but if the original investment in the utility plant has been unproductive or worse, new capital for extensions and enlarged capacity will not be forthcoming. It is generally recognized by commissions that it is a discouragingly difficult task to try to force first-class service and prompt extensions from a financially discredited plant.

If due consideration is given to the two fundamental parties, namely, the investor and the consumer, and if their confidence is gained, the regulating commissions in this country can assure themselves that the legitimate promoters and bankers and their respective followings, and the reorganizers, consolidators, and all the other cogwheels and lubricants that play a part in the great work of developing the resources of the country, will continue to exist, find their respective places, and exercise their proper functions. On the other hand, if, through lack of proper regulation, the consumer is abused and rises in his wrath against his servant, the public utility corporation, or if the investor, by harsh treatment dealt out either to him or to earlier investors, —for the experience of those who have already risked their money is deemed a sound indication of the fortune awaiting the investors of the future,—loses confidence in the securities offered by the corporation, it is obvious that the machinery of progress will cease to revolve in the particular locality, and will be transferred to other more promising fields.

The general recognition of these facts by the public and by the various governmental agencies seems to indicate that a beginning is being made in the definition of the sound economic limits of regulation, and in the definition of the true functions of commissions. Commissions, to be of real value to that public which they represent, should not only insure consumers against abuses, but they should secure them adequate present and future service. They should further affirmatively encourage the rapid development of the state, not by offering the minimum constitutional return upon capital to investors, but by entering the race for competitive capital and by spelling justice in large letters in their consideration of both of the principal parties in interest.

There is every indication that the present day commissions are seeking these ends; that they are actively striving for the broadest welfare of their communities, and that they are increasingly basing their activities upon the assumption that satisfied consumers and satisfied investors alike are interdependent and essential factors in prosperity. Through our public opinion, and thence through the lessons taught by our commissions, we are beginning to get an understanding of the psychology and needs of these, the real parties in interest, as well as a new consciousness of morality in our business. A sane growth of this understanding and consciousness spells construction and progress; a blind groping for that will-o'-the-wisp, "political favor," spells destruction and retrogression. The day of "gum shoe politics," and of "high finance" as well, is gone; the day of sound, honest business and the just regulation thereof, recognizing obligations to both investors and consumers, is dawning. By its light we can begin to discern a solution to the problem of the proper relation of government to business.

H. Alexander Smith

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The Telephone as a Public Utility

BY ARTHUR STEDMAN HILLS

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AT LAST the Atlantic and the Pacific are connected by telephone. For many months the work gangs with their mule teams and camping outfits have been toiling through the mountain passes and across the desert wastes from Denver, west to the coast, preparing the way for the first transcontinental talking circuit. This latest achievement in the art of telephony is the result of years of study and experimentation by scientific men, and marks an important step in the evolution of the telephone as a public utility.

From the very beginning, the inventive faculties of telephone engineers have been taxed with the problem of providing machinery for the transmission of the human voice over long distances. A thousand miles, two thousand miles, were finally conquered, but it was not until the perfection of recently discovered devices, prominent among them the wonderful loading coils, which magnify the electric sound waves, that over three thousand miles were brought within speaking range. The business man in New York can now converse from his luncheon table with his associate in San Francisco at his breakfast table. Distance has been eliminated. Time has been overtaken. The speed of the sun is as nothing compared with the lightning-like journey of the voice along the electrified copper wires at the rate of 56,000 miles a second. There is no appreciable interval between the speaking of the word and its reception. Only by means of scientific instruments is it possible to measure the one fifteenth of a second required by the electric waves to span the distance from ocean to ocean.

Yet this transcontinental telephone line is but one of the vast system of lines that covers the entire country with a network of talking facilities. Every city, town, and village has its telephone exchange. Even into the remote habitations of the prairie, into the mining camp on the mountain top, and into the seclusion of the forest, telephone lines have been extended, bringing their innumerable benefits to all. From the scientific toy of forty years ago the telephone has developed into an indispensable instrumentality of commerce and social intercourse. To-day's business could not be carried on without it. In the industrial maelstrom of our great cities, the sending of the daily telephone communications by messenger is unthinkable. It has been estimated by an ardent statistician that, should this suddenly become necessary, there would be no room upon the city streets for the legions of blue-coated youths with visored caps.

If the railroads may be described as the arteries of the nation, the telephone lines may be said to constitute its nervous system. Every event of any importance is heralded throughout the country almost instantly. No calamity, no good fortune can come to one community without simultaneous sorrowing or rejoicing in others, wherever and however the different interests are affected. The telephone is a factor for national solidarity. It has bound the people together, and inclines them toward peaceful pursuits. Seemingly insurmountable business and political misunderstandings often melt into insignificance when the modulated voice, indicative of the personality behind it, is wisely substituted for the uncompromising letter or the soulless document of state.

That this great instrumentality of peace and commerce should have been developed in this country, through individual initiative and with private capital, to a point far in advance of that reached

in any foreign country under government ownership is indeed significant. In the United States there are 9,000,000 telephone stations, or over 64 per cent of the total number in the world. There are more than 20,000,000 miles of telephone wire, and an investment in telephone plants aggregating more than $1,000,000,000. There are 16,000,000,000 telephone conversations each year, and over 32,000 distinct telephone systems. The gross earnings of the industry amount to more than $280,000,000 annually, and more than $100,000,000 are paid in wages. The Panama Canal has cost $310,000,000 in the last nine years; within the same space of time the Bell Telephone System alone has expended twice that sum in construction work.

This tremendous business, with its vast plant investment, its millions of subscribers, its hundreds of thousands of employees, and its numerous dependencies in collateral undertakings, is now subject to the control of the State Public Utilities Commissions and of the Interstate Commerce Commission. The responsibility of regulating a utility of this magnitude may rightly give the governmental agents considerable concern. Upon the wisdom of their edicts depend in large measure the interests of the subscribers whose business and social activities demand adequate facilities, the well-being of the army of employees and their families, as affected by the maintenance of proper wage scales and the security of thousands of investors who have hazarded their money for the upbuilding of this great public service.

It was only a few years ago that the change in public thought which has placed the telephone industry under the control of regulating commissions took place. After the expiration of the fundamental telephone patents, the industry was opened to the ravages of fierce competition. Rate war followed rate war in rapid succession. The interests of consumers and investors alike suffered until one of the competitors was forced from the field, or until consolidation was brought about. It was here that the economic fallacy of competition as a regulator of telephone rates and service was recognized. Rates reduced to meet competitive conditions did not afford sufficient revenue to furnish adequate service. Capital invested in duplicate plants often went to waste. Furthermore, it was seen that the struggle for supremacy inevitably resulted in monopolistic conditions which, if unregulated, would be a menace to the public welfare generally. This was the state of the public mind immediately preceding the enactment of the commission laws under which the telephone companies and many other utilities now carry on their business.

The telephone industry is, perhaps more than any other utility, subject to the evils of competition, and for this reason: The consumer of gas or electricity is little concerned about the number or ownership of the gas or electric plants in his community as long as his service is adequate and the rates he pays are reasonable. So, too, the individual traveler has little reason to object to two or more street car lines or railroad systems, as long as he is transported to his destination safely, with reasonable speed and comfort and for a fair price. In the case of the telephone, however, each subscriber is directly interested in reaching every other subscriber in his community, or perhaps in the entire country. Where there are two or more competing telephone companies operating in a single city or town, each with its separate set of patrons, it is impossible for one subscriber to reach all others without the installation of the telephone of each system and the payment of the service charge of each. A similar problem is presented throughout the country at large, where telephone systems under different managements, in different localities, have provided no means of intercommunication. Under the competitive regime the attempted remedies for these conditions through the building of duplicate lines and rate wars, were in reality ineffectual except in so far as they brought about consolidations and single service, thus eliminating competition which was relied upon as the remedy. Accordingly, the present regime recognizes the economic soundness of monopolistic conditions in the public service under proper governmental supervision.

The doctrines of this new school have overspread the country in seven years. The new laws have not only crystallized the old canons of the common law governing industries affected with a public interest, but they have also extended regulation into fields unthought-of a few decades ago. Classifications of accounts have been prescribed, standards of service have been ordered, specifications for the construction of lines have been promulgated, partly to protect the service and partly as measures of safety to the public and to employees. The old theory of rate-making, based solely upon the value of the service to the consumer, has given way to a newer theory of rates which takes into account also property values, operating costs, and factors relating thereto. These developments have not affected telephone companies alone; they apply as well to light, heat, power, and traction companies, and to many other businesses that have been placed under the control of the Public Utilities Commissions since 1907.

It must not be assumed that the change in public thought with respect to competition and the enactment of commission laws, have operated, or will necessarily operate, to create national monopolies in the various kinds of public service. As has been stated, there are to-day 32,000 distinct telephone systems, including farm and rural systems, operating throughout the United States. Many of these systems are conducting their business in localities where active competition exists; but the new laws are designed to do away with the evils of competition. Other systems have acquired local monopolies in certain cities and districts; but the new laws are designed to prevent the well-known evils of unregulated monopoly.

It is apparent, therefore, that one of the great problems for the Public Utilities Commissions, and for the companies themselves, is to work out from this heterogeneous mass of different telephone systems, operating under all sorts of conditions, with different equipment, different managements, different policies, different service and different rates, a unified telephone system, not necessarily under one management, but with one policy, equitable rates and universal service. In this great work it must be recognized that the telephone partakes, perhaps more than any other utility, of the necessity of oneness; that it is a nation-wide institution presenting all the difficulties arising from conflicting state and interstate jurisdictions; that the demands for rapid expansion require the investment of large amounts of new capital; that the investor who sees the security of his investment threatened by over-regulation will find other channels for his money, and that an insolvent utility cannot properly perform its obligations as a public servant.

The development of telephone service and facilities in the United States should be, and is, a matter of national pride. To maintain the standards established, and to improve them, to make possible proper extensions to keep pace with the growth of the country, and to bring into harmonious co-operation for the public welfare the numerous separate systems, is a stupendous task. To accomplish it, the commissioners must be men of honesty and intelligence, well paid, and with long tenures of office, selected because of particular qualifications for their work, and of such caliber as to be above political or other influences that would militate against a fair and impartial performance of their duties.

Arthur Stadman Hills.

The Public Service Commission of Maryland, its Ideals and Work

BY ALBERT G. TOWERS, CHAIRMAN

PUBLIC service commission can be an instrument of great good or of great harm in a state. It can promote satisfactory service by the public service corporations, or it can destroy it. Within reasonable limits, it has the power to make successful and prosperous public service corporations, or to unmake them.

The ordinary conception of a public service commission is that it is an organization designed primarily for the punishment of wicked public service corporations.

This is a mistake. In the case of the criminal law, it is the policy of the state to lock up or hang the offender against the public, thus putting an end, either for the time being or permanently, to his power to do further harm to society. But that is not the policy of state regulation of public utilities. The true function of the public service commission is to secure for the public the highest possible percentage of efficiency from existing public service corporations at reasonable rates, and to promote the creation and development of others in communities where they are needed. Punishment, by the imposition of penalties or otherwise, is permitted not as retaliation for offenses against the public, as in the case of the criminal law, but merely as a means of securing more satisfactory service from the corporation which is at fault.

And such are the conceptions of their duty held by the members of the Public Service Commission of Maryland.

A striking illustration of the application of this policy is afforded by the case of the Ruxton Water Company, which came before the Commission last summer. This company had permitted its plant to run down to such an extent that it was no longer able to furnish any water at all to its patrons at Ruxton. As a consequence, over fifty families were without water for ordinary domestic use. The Commission realized the serious nature of the emergency, undertook an investigation of its own motion within twenty-four hours of receipt of the above information, saw that there was no possibility of immediate relief through the company itself, and a few days later took charge of the plant with the consent of the company, installed additional appliances, and itself furnished the people of Ruxton with an adequate supply of water until the plant was taken over by another company which meanwhile purchased the same. In this case the Commission went far beyond its functions under the law, but the net result was a distinct benefit to the public. Had the usual forms of procedure been followed, the people of Ruxton would have been without water for many months, and the company itself driven into bankruptcy, all without any material improvement in conditions for the future.

This Commission has under its jurisdiction investments in public utilities aggregating over one billion five hundred million dollars. As to the general public, we recognize to the full extent our obligation to see that the whole of this tremendous investment is used most efficiently for the public benefit. As to the owners of this investment, we recognize our obligation to see that it is not impaired or destroyed by the enforcement of unjust demands upon the part of the public.

This task is one which is not lightly to be undertaken, or, when undertaken, to be lightly or perfunctorily performed

Our responsibility to the public is a tremendous one.

For instance, the report of the Assistant General Counsel to the Commission, filed December 31st last year, shows that four of the rate cases which he now has on hand for the Commission involve directly the interests of over 791,000 citizens of this state out of a total population of 1,295,346, according to the census of 1910. In addition, this responsibility extends to the owner of approximately ninety-two millions of property owned by these four corporations within this state. Each one of these cases must receive our careful and conscientious consideration.

Needless to say, the determination of questions of such magnitude involves a large amount of labor, and requires an efficient organization.

The Public Service Commission of Maryland was created in the early part of 1910, something less than five years ago. Offices were secured on the fifth floor of the Old Builders Exchange Building, at the northeast corner of Charles and Lexington streets. Gradually, as the work of the Commission increased, and its papers and records accumulated, the Commission found itself cramped for space. In addition, the hearing room was wholly inadequate for the Commission's requirements. Consequently, in the summer of 1914 the Commission leased the entire seventeenth floor of the Munsey Building, with the exception of one office, which had previously been tenanted. At the time of our lease this floor had not been subdivided, and plans were drawn for a subdivision to meet the requirements of the Commission. Primarily a large hearing room was provided, and the offices of the individual members of the Commission laid off conveniently near the same. An adequate suite of rooms was laid out for the secretary and his staff, another for the chief engineer and his staff, another for the rate clerk, and another for the stenographic force. The entire eastern side of the floor was laid out for the use of the general counsel to the Commission, the assistant general counsel and the auditor. The effect of this arrangement was to give all the officials and employees of the Commission adequate working space, tastefully furnished, and conveniently arranged.

The next step was to secure suitable equipment and working appliances for the entire force. This was done, at some little expense, it is true, but with great increase of efficiency in every department. Among other appliances installed were a number of dictating machines, with the result that reports of hearings which previously had to be typewritten by outside stenographers at great expense are now handled satisfactorily, expeditiously, and much more economically, by our own force.

Additional testing apparatus and other appliances were purchased for the chief engineer, with the result that his office is much more efficient than formerly.

Necessary additional furniture was purchased for all the offices, and the general appearance of the entire floor now occupied by the Commission is businesslike, yet at the same time tasteful and pleasing.

And, gratifying to state, the additional rent has been paid, and all the new furniture and appliances purchased, within the current annual appropriation made by the legislature for the work of the Commission. This was accomplished by the use of care in the making of expenditures for the general work of the Commission, without, however, sacrificing or slighting any of the same.

So much for the merely physical aspects of the case.

The records of the Commission for the past year show a great increase in the efficiency of its work all along the line, this being largely attributable to the fact that the office facilities are more satisfactory, and the employees more experienced and highly trained.

The work of the legal department of the Commission has grown rapidly, and the bulk of the legal work has fallen directly upon the general counsel, who has rendered the Commission a great number of legal opinions during the last year, and has appeared in the courts on its behalf in a number of most important cases. His labor in this connection during that period has been heavier than ever before in the history of the Commission.

As a rule, contested cases arising before the Commission have been promptly heard and speedily determined. In fact the files have been kept almost clear all the time. A few cases have had to be held over because of the pressure upon our engineering, accounting, and legal departments, arising out of the pendency of several large investigations, notably those of the Chesapeake & Potomac Telephone Company, and the United Railways & Electric Company.

These investigations are being conducted along an entirely new line, to which the Commission is entitled to credit in that it was devised by our assistant general counsel. The method, in brief, involves a painstaking and minute threshing out, by competent opposing engineers in conference, of the details of property valuations, leaving to the Commission the determination only of questions of principle. These principles being determined by the Commission as they arise, the figures are filled in by competent engineers and accountants accordingly, thus relieving the Commission of the always onerous task of going over and analyzing the great masses of figures which are invariably involved in investigations of this character. The plan is strictly in accord with modern business methods, is apt to yield better final results than the old plan, where the Commission had to be judge, lawyer, engineer, and accountant all combined, and has been most favorably commented upon by a number of the leading appraisal engineers in the country. This method will be used in making appraisals of the properties of all the public service corporations subject to the jurisdiction of the Commission.

Incidentally, the accounting systems prescribed by the Commission for utilities of various kinds are being improved, so that eventually when the work is completed in its entirety, and kept up to date by the annual reports made pursuant to such accounting system, it will be possible at any time for the Commission to determine the fair value of the property of any public service corporation in the state almost instantly, for purposes of rate-making or capitalization, thus obviating the necessity of the long periods of delay which ordinarily ensue while an investigation into such value is being made.

In conclusion, the Public Service Commission of Maryland is at this time efficient in its every department to a degree which is believed to be distinctly in advance of the earlier stages of its history. As stated, as a Commission we are less than five years old. We have still much work to do, and much to learn.

But with a continuance of our present methods and ideals of accomplishment, we hope and expect within a very few years to come to demonstrate to the entire satisfaction of every citizen of the state that the regulation of public service corporations by a commission is an unqualified success in the state of Maryland.

Albert G. Dawes

Philosophic Essays On Law

Fifth Essay: The Derivative Lex

By WILLIAM W. BREWTON

Of the Fort Valley (Ga.) Bar

"Those who have treated of the sciences have been either empirics or dogmatical. The former, like ants, only heap up and use their store; the latter, like spiders, spin out their own webs. The bee, a mean between both, extracts matter from the flowers of the garden and the field, but works and fashions it by its own efforts."—*Francis Bacon.*

IF THE author of this series of legal essays were called upon to answer the question of why error has ever attended the operations of man, he would reply that this has been true for two basic and fundamental reasons: Because of the inability of the human apprehension to anticipate destiny; and because of man's disregard of his nature and powers in their totality. The former of these two deductions, in its essence, is inevitable and irremediable. The latter is remediable and therefore culpable.

We have had occasion, in the course of these essays, to denominate the principle, Technicality, as the inevitable source of human error. This principle is nothing more or less than the logical result of the first reason named above. For it is not revealed to man, as he lays the plans for his life, the complete field over which his plans must operate; that is to say, he cannot foretell with certainty the scope of his life. And thus in his pathway he comes upon errors he could have wished to avoid, yet which it has been impossible for him to do. So that while, in his general progress in the overcoming of error, he may more and more remedy defects arising from this cause, its essence and principle must ever remain.

Similar argument and excuse cannot be laid down in regard to our reason secondly named. For in this case error has arisen because of the lack of proper caution, reflection, and investigation. It cannot be properly said that defect, occasioned by reason of man's inattention to certain phases of his nature, though great wisdom and care be given others, is inevitable and necessary. For although, as man cannot change the law of his nature, it is certain that he will find himself in fault if he neglects any part thereof, yet it is not necessary that such fault shall exist, inasmuch as it is not necessary that there shall exist the neglect. Caution and investigation, the bringing into action all of one's properly available powers, is the method by which one avoids most error. To illustrate this truth, it may be mentioned that the development of only one faculty of the mind, in disregard of all the others, would appear clearly an error, inasmuch as countless errors would be sure to result from such a course. History affords the reader an ample storehouse of illustrations of our conclusions here. Man to-day considers it very strange that such a vast part of past war has resulted from dispute concerning religion,—concerning religion, even, which denounced war. Yet such strife took place principally for the sole reason that certain factions endeavored to thrust upon others their own beliefs; such conduct exhibiting the fact that reason, one of man's great faculties,—the one alone which may overcome error,—had been abandoned in the affairs of men, to make way for the reign of bigotry. It would be impossible to conceive of the wars of religion as anything else than monumental error; and the cultivation of certain phases of man's nature, his corrupt ideas, ideals, and dissimulation, with the neglect of his reason which would have taught recognition of human rights,

the diversity of human requirements, and the dissimilarity of human nature, must forever be declared the cause—the deep-seated and unconcealable cause—of such tragic error. If man will lend his strength to anything except the improvement and perfection of all his powers and phases of being, he will suffer the retribution consequent to such a course; and reason, borne out by history, declares that this will ever be true.

But reason also declares, and again substantiated by history, that progress, advancement, the attainment of truth, comes with the recognition of human being as it is; comes with the development of all the phases of its nature. For the world's progress during the past fifty years has been but a demonstration of the differentiated scheme of meeting man's need; and error has been decreasing very rapidly with an inevitably attendant advance in the improvement of world conditions. Error increases in direct ratio with the disregard of human character in its completeness; and decreases similarly with the ascertainment of human faculties and their proper cultivation. This ascertainment and improvement may be attained where there is proper investigation made by man into his own nature and requirements. So that error arising because of a lack of such investigation is nothing short of a disregard of the opportunity for securing truth, and man is not to be excused for such delinquency. When the field from which truth is to be derived is present and open, let us not say that the truth cannot be extracted. Man's own nature should ever be a realm of interest to him; and indeed must be, if he is to have the aid of his correlated powers. For error, though unnecessary, yet will always obtain when that which is elemental, and therefore unchangeful, is understood otherwise than in its totality.

Polemicism has, in all history, characterized general philosophy. This realm of thought has been the battle ground of the thinkers of all ages. Philosophy, covering, as it does, all branches of learning, has been at all times the means employed by disputants for the establishment of their claims. The respective opinions of scientists, moralists, and all investigators, whether of the so-called practical or impractical school, have been advanced for their proof in the dress of philosophy; and the diversity of views held has been very great. Apparently cogent reasoning has been used by all the principal claimants for attention; so that if the student will investigate each body of views, he will in the end ask himself whom should he believe, for he will have come upon such a frequency of bewildering opposition and contradiction, that the finality and satisfaction of conclusion he has hoped to find will not have been obtained. The student will have, on the other hand, a question he himself must solve,—that of determining the cause for so great a quantity of philosophical contention. To explain this existence of diversity of views, we might easily adduce the answer that, inasmuch as men are created with individuality of mind, and are necessarily independent of each other in their natures, difference of opinion is logical and naturally to be expected; and that, inasmuch as dissimilarity is true of every other condition of life, it is reasonably true of the operations of the mind, and therefore of philosophical thought. Such an answer would be reasonable and good if it were our purpose here simply to draw conclusions of a general nature, and which may apply to diversity in human nature in its entirety. However, it is for some specific answer to the question of contradiction in philosophical teaching, that we seek,—an answer which, we hope, will indicate wherein lies the error of such contradiction.

Now, contradiction in philosophic thought is validly illustrated in the meeting of the practical with the impractical. This occurs when matter represented to the mind from one of these realms is opposed to matter represented from the other. Such opposition may arise with facility because of the independence of the two realms. The field of empiricism, from which matter is offered to the mind through the agency of sensibility, is completely outside and independent of transcendentalism, from which matter is offered the mind through the agency of intuition; insomuch that matter arising

from the former, practical realm, lacking, as it does, all necessity of identity to that of the latter, impractical realm, may in any indeterminate instance lead to conclusions which are antithetical to those drawn from the other, pure source. That is to say, inasmuch as the two fundamental sources of the matter of thought, —the practical and empirical, and the impractical and transcendental,— are simple and absolute in themselves, their data are likewise so; insomuch that contradiction from the opposition of their respective data may arise at any time. To illustrate: The proof of the existence of a Supreme Being, by the investigator who proceeds upon a transcendental method, may be concluded to be impossible because of failure throughout the entire process of his introspection to discover any data which represents such an existence; whereas, upon his entering the field of empirical thought, his conclusions may be the converse, inasmuch as here he may accept the conditions represented to him of creation, visible power, form, and unity of design as proof of a Primal Being. So that contradiction in the two realms of thought will thus have obtained by reason of our above-mentioned meeting of the mental operations of the practical with those of the impractical. Let the reader not suppose here that the author has advanced any opinion concerning the existence of a Supreme Being. It has been relevant for him to present this illustration only to set forth the method by which the various aspects of philosophy may be contradictory. And this has been accomplished by pointing out the truth, that matter for thought derived from one source may terminate in a different judgment from one concluded from matter derived from a different, independent source, although all thought is preceded by a desire to reach the same result in each case.

Now, although contradiction may arise in the course of thought, as in the case of the meeting of the practical with the impractical, it is not necessary that error shall be the result; that is to say, that man shall be, as a consequence of such contradiction, the victim of empty and illusory conclusions, which it shall be impossible to rectify. For man is not compelled to accept as his guide conclusions from one source, which oppose others from another source equally as valid. For instance, our above-mentioned investigator is not compelled to deny the existence of a Primal Being because he may conclude nonexistence from a certain scheme of data, when another such scheme of equally deserving claims leads to the conclusion of existence. Indeed, he would be unnecessarily in error, and unjustified in doing so, inasmuch as he shall not arbitrarily set the one scheme, which has proceeded to the goal of clear and unimpeachable judgment, above the other, which has done the same—even though the two judgments are contradictory. If he contends that he cannot reconcile the two opposing results, and yet desires to prove his theory (either existence or nonexistence, whichever he may hold), he must proceed upon other grounds and by some other method; for, in itself, he cannot reject with reason either of two conclusions equally validly drawn. And thus all properly derived conclusions of the mind shall have their place of recognition; and the two basic fields of thought, with their various phases, shall receive attention by man, who is incapable of discarding any of his faculties.

And so practical philosophy shall not reasonably scout the claims of the impractical, nor shall the latter do so in the case of the former. It is here that error has existed from the beginning of the history of mental science. Polemics in one sphere of thought, directed at other branches, have received retaliation, with the result that formal contradiction among the sciences has been manifold. And while the respective domains of the various branches of learning may show dissimilarity, and appear absolute in themselves and as having little in common, yet the mind of man has erected them all, and has done so in each case by the fundamental processes of reason. So that mere dissimilarity in the subject-matter of the sciences, and the different fields of formal philosophy, shall not be any excuse for error arising from any one from a refusal to acknowledge any fundamental process by which that

particular branch of learning is built. Error in human thought, in science, has arisen for the same reason that it has arisen in the general affairs of man,—because of the disregard of some of those processes and methods by which it is necessarily built. In the history of philosophy, remediable error has arisen not only because of one branch scouting the claims of another, but also because of the unrecognition by single branches of certain of their own inherent data; for many departments of this general science have been long in learning that they are not to reject any legitimate field of representation from which may be derived relevant matter. And here, of course, we include all the sciences, whether considered practical or impractical, inasmuch as the building of them all is by similar method,—that method which may be called the determination and systematizing of matter. It is our purpose here, of course, in setting forth with particularity the truth of our assertions concerning the wisdom of the recognition by science of all fields of legitimate representation, to deal with only one of the sciences,—that of the Law.

We have indicated in our above observations that in all departments of human knowledge, in all the branches of learning, the fundamental rules determining their essence, that is to say, their philosophy, have been composed of data drawn from the practical and impractical. These two realms from which the matter of the science has been taken are the two distinct and fundamental ones. So that every phase of any science, in its simplicity, has been drawn from either the one or the other. The individuality of any science, thus, is not determined by recognizing the mental operations which establish the science, that is to say, by first determining the basic and elemental faculties of the mind which present the matter of the science; inasmuch as all sciences are presented by the same faculties; but this individuality, this definitive particularity, is determined by first determining the *purpose* of the science. That is to say, we recognize a difference in nature among the sciences because of the individual and dissimilar purpose of each. And the practical and impractical spheres of the mind will present different matter in the case of each science, in accordance with that science's individual purpose as a department in human knowledge. The Law is a science derived from the two practical and impractical spheres of the mind, and has for itself a particular purpose. It is our purpose here to indicate generally the nature of that matter which this science derives from each, in furtherance of its purpose; and in so doing we adduce the following preliminary statement:—

The Law is an instrument of justice, derived from human intellect and experience. From the intellect, it derives morality; from experience, it derives expediency.

The definitive purpose of the Law, thus, is justice, and the practical and impractical realms of the mind each contribute to it the particular matter we have named. The pure mind, the intellect, which is the impractical realm, furnishes the moral rules of the Law, the rules by which the right and wrong of laws may be determined. It is from the practical realm of experience that the rules determining the objective, applicable validity of laws are determined. The necessity and value of both spheres appear obvious to the thoughtful investigator, insomuch that he shall not fall into the error of presuming either of them, with its respective data, unnecessary. The right and wrong of laws, and their practicability, compose the legal scheme with its primary and all-pervading purpose,—justice.

The morality which the Law shall possess is that which is drawn from the determinative faculty of the mind—which is the result of the operations of this faculty over all matter which has been represented to it. This determinative and analytical faculty is, of course, a phase of the intellect, and the right or wrong of any law is determined by it. It judges not only of representations which intuition may present, but also of those which are presented by sensibility from experience. Morality may be said to be symbolized by that phase of the determining faculty of the mind which judges of right and wrong. But the data upon which it must pass may be

either pure or empirical; that is to say, the right or wrong of a law may be determined so either from conclusions which rest purely and independently within the mind, or from conclusions drawn from a knowledge of the external world and its affairs. So that the meeting of the practical with the impractical is observed even within the province of the general impractical and moral realm of the Law; that is to say, the moral consciousness of the mind, which we must denominate impractical inasmuch as it rests above the matter offered by the external world, must itself determine questions presented by both the abstract mind and the external world. As we had occasion to show in a preceding essay, rules of right for legal justice, which have been derived solely from one of these realms—which have been derived simply from the abstract mind—are not to be embodied in the Law, to the disregard of the other, external source. Both the purely intellectual source of representation, the abstract source within the mind itself, and the empirical source of experience, must receive consideration. We had occasion to demonstrate that when the former of these is unavailable for furnishing matter, or is impracticable in its matter, it is the latter realm alone from which moral data should be derived. And conversely, we concluded that, when beneficial and practicable results were to be had together with the advantage afforded by the universal nature of the abstract source, this source should also receive consideration. Both sources from which were taken the material for building, we saw, should have their places in the work; and the independent, determining, moral faculty should make its proper selections in keeping with the nature of the particular work to be performed, the particular law to be created.

General legal morality, however, may be said to be the peculiarly intellectual side of the Law. Because it is the intellectual side, few changes are made in its sphere compared to the number made in the general, empirical sphere, the side of the Law established by general experience. A law, for illustration, may be changed in the present from its past status because the latter is considered unjust and the source of wrong; but such a change occurs far less frequently than one regarding legal policy. The law of murder, and its punishment, for example, changes a far less number of times than the law of negotiable instruments. This is for the reason that the principles of morality play a larger part in the former than in the latter—which principles, being essentially intellectual, are more universal in validity than the essentially politic principles governing the latter. The data establishing the moral side of the Law are less diversified and complex, less technical, than those establishing the practical side, for the same reason of universality. The empirical realm of the Law, being great in scope in order to accommodate a comparatively immeasurable field over which it is to operate, meets with a greater number of contradictions, due to this necessarily very diversified application, than the intellectual realm, whose rules are issued from a far more centralized and unified tribunal, and the empirical realm therefore meets with a greater number of changes; thus illustrating that most of our laws are essentially empirical, and not intellectual. But while most of the content of the Law is of an empirical origin, the intellectual phase is of constant appearance—of peculiarly constant appearance in the Law, inasmuch as the intellectual phase of the Law is morality. Morality, existing in science, may be said to be very peculiar to the Law, inasmuch as it must ever be essential in working out justice, which is the end of the Law. It will be clear to the mind of the most casual thinker that justice and morality are inseparable, howsoever the justice may be attained, whether by means of abstract mental data or by means of data given by the sensibility. In creating the Law, the legislator is not to disregard the principles of morality, those principles concluded from the consciousness of right and wrong; for how such a neglect could defeat the attainment of just laws is obvious. But, on the contrary, the legislator shall use every caution, and bring to bear every investigation in embodying in the law as high a degree of moral rectitude as possible. He shall

do this in order that laws lacking in justice and right, though seemingly warranted and called for by external conditions, may not be created to the defeat of legal means which are beneficial. Justice and morality are inseparable principles, and inasmuch as the end of the Law is the former, there should always be present in it the latter. The degree of morality present in any particular law may be more or less noticeable than the quantity present in any other law, on account of the fact that the ideas concerning morality held by him who has the particular law under consideration may vary with regard to different laws; that is to say, a man's views concerning the nature of morality may be such that he will recognize the operations of the mental judgment of right and wrong in the making of one given law more readily than in another. He may consider, on account of his conception of the nature of moral principle, that one law is based upon morality to a greater extent than another law; and may thus assume that morality is limited, and not universal in the Law. For instance, the casual observer will recognize at once that the criminal laws spring from the principles of right and wrong, but may not so readily note the same in regard to the civil. The latter may appear to him to be mostly from a source of policy and expediency, and therefore to have been founded, in many instances, without regard to questions of right and wrong. This view, however, is erroneous, and has arisen because of an illusion arising principally in the case of the criminal law. The criminal laws are directed against him who shall violate the common, ordinary, and well-understood rules of right; rules which appear general because of common appreciation, which spring from man's most quickly conceived moral ideas, and a violation of which results in consequences usually more serious than the consequences resulting from a breach of the civil laws, whose rules of right and wrong, contemplating less sensational matter, are not so readily and commonly appreciated and understood. So that to the casual observer it appears that moral principles do not abound in the civil law, although they do abound there, and are necessarily a part of every properly made law, even though they may be more prominent in some laws than in others. Civil laws, though not dealing with a phase of the Law which contains issues of such vital importance to life as the criminal, yet are properly framed in recognition of moral rules, though these rules are not so readily apprehended or so easily determined and applied. (We speak here, of course, of criminal law and civil law from their general and fundamental standpoint, and recognizing that the exception may be made that some civil laws are based more upon moral principles and less upon politic principles than some criminal laws.) A law is not necessarily morally incorrect because no ordinary rule of right is its basis. A law may simply be uncontradictory to any formal rule of right, and be correct; that is to say, it may appear to rest upon no positive principle of right and yet be morally satisfactory, inasmuch as it conflicts with no judgment of wrong. So that laws, as is the case of some civil, may contain a full degree of moral principle and yet present no ordinary and commonly appreciated illustration of that fact. For example, a statute establishing a boundary between two states indicates to the mind, at first, no sign of there having been any moral determinations in its framing. But such a characteristic has been present, nevertheless, inasmuch as such a law, satisfactorily created and put in force, has met all the requirements of the question of right and wrong which have been directed to it; that is to say, there is no practicable injustice found to be contained in it. This law, therefore, complies with the principles of right, and is founded upon morality. And thus morality is a principle which the legislator should guarantee in all laws created, for it is necessarily a part of good Law. Injustice in the Law is avoided by the legislator in using caution in the framing of all statutes, in carefully applying to proposed legislation the test of moral principle—in recognizing the general intellectual side of the Law, which determines its right and wrong.

It is through experience that the great

mass of the Law's subject-matter is derived. The greater portion of the Law's content is taken from the affairs of men, —not their ideas. The Law is shot through with the business of life, its manifold objects and relations. The objects of experience are ever heaping up data for the Law's attention, material which will be woven into the increasingly complex fabric of the Law; until every basic and elemental principle of it has a more or less highly diversified scheme of statutes built upon it. The number of laws of existing force to-day is great, mainly because man, as progress in civilization continues, is more and more alert to his surroundings, to the affairs of the world. The more attention he gives to these conditions of experience, the greater the number of laws he creates. Insomuch that the former *régime* of Common Law would be astounded at the attention the modern system of Statutory Law gives many subjects. Experience to-day is far broader than it has ever been before, and the affairs of society are broader and more numerous. And inasmuch as public affairs, in regard to their reform and improvement, are peculiarly the province of the Law, their enlargement automatically, so to speak, enlarges the Law by constantly presenting new subjects for treatment.

As more and more Law is derived from this constantly developing field of experience, it becomes more and more the duty of the legislator to use discrimination in the making of laws, for in no other way can the proper policy be engendered in legal science. Experience itself furnishes this legal policy, for from the data derived from it may be chosen those subjects which should receive the Law's attention, those subjects which contribute to proper and expedient laws. It is from an understanding of the affairs of society in their interrelation that the legislator determines the most advisable additions to the Law, and it is thus that the Law derives expediency from experience. Expediency, therefore, is a phase of legal science which shall not be overlooked, in order to create laws which are based simply upon moral rules. Unless the legislator shall study the affairs of society, he cannot hope to make wise laws. The general empirical side of legal science must receive great consideration, and must progress hand in hand with the intellectual. Justice as a beneficial and practical force is unattainable otherwise, and any other procedure than this will defeat the end of the Law. Unless the realm of practical human affairs receives consideration, it is impossible for the legislator to frame such laws as are proper, advisable, and beneficial,—such laws as are expedient; for the framing of such laws can be attained only by relating and comparing human needs, and selecting those sources of experience which are most properly the subject-matter of specific legislation. Complying with the demands of expediency is that condition precedent which determines a law's applicability, and expediency is therefore a fundamental side of the Law as a science.

Thus the Law, in illustration of our contention that all the fundamental principles of any science must receive attention if that science is to develop under conditions of minimum error, presents two general sides, both of which are inevitable to legal progress. Morality and expediency, respectively the impractical and practical realms of the Law, are the two conditions in legal science which meet and which the Lawmaker must recognize. A disregard of either will result in culpable error,—error whose remaining unremedied we cannot excuse, inasmuch as such neglect can only spring from the narrow mind, and from the mind that either dogmatically clings to mere inwardly satisfactory theories, or else refuses to lend attention to the discriminating forces of the clear reason. The progress of the Law is deterred in the same way in which the progress of all other sciences is deterred,—by man's neglect to employ his complete faculties, and his knowledge of the sciences' every phase of defect for their advancement. And the progress of legal science, as is the case of all science, is enhanced by making this employment, by man's use of his nature and powers in their totality, which enjoins granting to both the practical and impractical spheres of thought their proper places.

Then legal science, the Law, is but a

systematically arranged scheme of rules which can exist in their proper form only as they are derived from the two realms of thought we have discussed. We have shown that, if the best and most reasonable and beneficial result is sought, there need be no difficulty in securing this result merely because these two realms are understood to be theoretically opposed. For this best and most reasonable result is attained only when the two spheres of thought are allowed to come together on any question, and by accepting as the course to follow the decision which shall thus be arrived at. There have been many errors in Lawmaking caused by the failure to correlate the *affairs* of man with his *ideas*.

But legal history presents a record of great achievement in the overcoming of this fault. Legal progress has been gradual and permanent; and as the conditions of life have become more and more complex, the Law has shown a high degree of appreciation of this fact, and its ever-increasing number of statutes indicates the recognition the legal thinker is to-day giving the affairs of society. However, the intellectual sphere must also ever attend in Lawmaking, for otherwise too numerous and unsound laws will result—an error which we must concede is somewhat prevalent to-day. Mere attention to the affairs of society may suggest the need of many statutes which sound judgment, resulting from the operations of all the legitimate human faculties, may determine unneedful. That law is the soundest and best which is derived from both human intellect and experience, and which is therefore both moral and expedient.

William W. Brewster.

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NEW ELECTRIC MAIL TUBE CARRIER OF THE AMERICAN PNEUMATIC SERVICE CO.

Judicial Control of Commission Rate Making

BY LAWRENCE B. EVANS

Of the Boston Bar

THE adoption of the commission as the agency for the regulation of the charges levied by public utilities, especially carriers, is so widespread and has been attended by such a degree of success that it may now be regarded as permanently established. We have not only the Interstate Commerce Commission, the powers of which have been vastly increased since its establishment in 1887, but following the examples set by New York and Wisconsin under the leadership of Governor Hughes and Governor La Follette in 1906, all the states, with but one or two exceptions, have created commissions of general jurisdiction, with varying authority over charges and service. It is significant of the position which such commissions now occupy that in his last annual report the president of the Pennsylvania Railway advises frank submission to their jurisdiction, while President Vail of the American Telephone and Telegraph Co. says:

> Regulation and control by commissions or business courts have, so far as any one can forecast the future, become a permanent feature of our economic laws. Like all new departures from established practice, it could not be perfect from the start. Practice, experience and evolution on the lines pointed out by practice and experience can make perfection. The few years' experience has brought out prominently both good and bad features, but it has demonstrated that there are great possibilities of good and a strong probability if not a certainty that there can be had through them, a satisfactory solution of the economic problems as well as the correction of such business practices, of inherent badness, as were forcing otherwise conservative and right-seeing and right-believing people into the ranks of extreme radicals.

Commissions are so novel a feature in our governmental system, however, that they may be said to be still in process of adjustment. But when the vast extent of the interests committed to their charge is considered, their importance can hardly be exaggerated. A large proportion of the total capital invested in the country depends upon their decisions for the remuneration which it will receive, and the rate of return permitted will determine the ability of public-service corporations to attract new capital as it may be needed for replacement and for extension. Hence the use made by commissions of their rate-making powers are of interest, not only to the shareholders in the corporations affected, but also to all the communities which they serve.

It is now well settled that it is not unconstitutional for a legislature to vest a commission with rate-making powers. Formerly there was considerable doubt as to the validity of such a measure, for it is recognized that the function of rate making is clearly of a legislative character, and this is true whether it is exercised directly by the legislature or is devolved upon an administrative body. "The completed act derives its authority from the legislature, and must be regarded as an exercise of the legislative power."[1] To vest such authority in a commission seemed a violation of the maxim that legislative power cannot be delegated. This result, however, has been avoided by drawing a distinction

[1] Knoxville v. Knoxville Water Co. (1909) 212 U. S. 1, 8, 53 L. ed. 371, 378, 29 Sup. Ct. Rep. 148. See also Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. (1897) 167 U. S. 479, 499, 42 L. ed. 243, 253, 17 Sup. Ct. Rep. 896; McChord v. Louisville & N. R. Co. (1902) 183 U. S. 483, 495, 46 L. ed. 289, 295, 22 Sup. Ct. Rep. 165; Prentis v. Atlantic Coast Line Co. (1908) 211 U. S. 210, 226, 53 L. ed. 150, 158, 29 Sup. Ct. Rep. 67.

between legislation and administration. "The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress."[2] It has taken the courts some time to arrive at this result, for the distinction between legislative and administrative, on the one side, and administrative and executive, on the other, is derived from continental rather than common-law jurisdictions. But the distinction is now definitely accepted, and the validity of delegating the rate-making power to commissions is no longer doubted by the courts.[3] This result, however, seems to be forced upon them by the necessities of the case, rather than by sound reasoning. It was obvious that the public interests required that railway rates should be subjected to some kind of public control. The situation was too complex for each case to be dealt with by statute. But it certainly requires some stretch of the imagination to say that the legislature has laid down "the general rules of action under which a commission may proceed," when, as in the case of the Interstate Commerce Commission, Congress has said only that rates shall not be unreasonable nor unduly discriminatory, and then has authorized the commission to determine what will be the "just and reasonable individual or joint rates," and "what individual or joint classification, regulation, or practice is just, fair, and reasonable." The general rule of action here laid down is so general as to be practically no rule of action at all.

The vast powers confided to commissions, and the fact that those bodies are often composed of men who do not measure up to their duties and who do not administer their powers in such a way as to inspire confidence in their decisions, have led the corporations affected to seek the protection of the courts. And this in spite of the fact that in some states the act creating the commission declared that its conclusions should be final, while in others, appeal to the courts was accompanied by such heavy penalties as to be an effective deterrent. This has raised the question as to the relation of commissions to the courts. Can a state deprive a litigant before a commission of the right of appeal to the courts? Can the decisions of a nonjudicial body by which property rights are affected without recourse to the courts ever constitute due process of law as that term is used in the Constitution?

As all roads lead to Rome, so all discussion of the public control of rate making seems to go back to the great case of Munn v. Illinois,[4] a decision which has in it some language affording much comfort to those who think that the rate-making orders of a legislature or a commission should not be subject to judicial review. The facts of that case are too familiar to require repetition. It is only necessary to say that the point at issue was as to whether a warehouse for the storage of grain was so affected with a public interest as to be subject to public regulation. The court held that it was, and if the arguments of counsel and the opinions of both the majority and the dissenting justices be carefully scrutinized, it will be seen that this was the only question that the court decided. The appellant based his case not on the argument that the rate fixed was unduly low, but that the state had no right to fix a rate at all. The opinion of the court is for the most part devoted to showing that the business of warehousing grain,

[2] Interstate Commerce Commission v. Goodrich Transit Co. (1912) 224 U. S. 194, 56 L. ed. 729, 32 Sup. Ct. Rep. 436.

[3] Stone v. Farmers' Loan & T. Co. (1886) 116 U. S. 397, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Reagan v. Farmers' Loan & T. Co. (1894) 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission (1907) 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Honolulu Rapid Transit & Land Co. v. Hawaii (1908) 211 U. S. 282, 53 L. ed. 186, 29 Sup. Ct. Rep. 55; Grand Trunk Western R. Co. v. Railroad Commission (1911) 221 U. S. 400, 55 L. ed. 786, 31 Sup. Ct. Rep. 537.

[4] Munn v. Illinois (1876) 94 U. S. 113, 24 L. ed. 77.

as it had developed in Chicago during the preceding twenty years, held such a relation to the commerce of the community as to affect it with a public interest, and bring it within that class of industries which had long been recognized as subject to public control. The vigorous dissenting opinion of Justice Field was devoted almost entirely to rebutting that contention. The question as to whether the business was subject to public regulation of any kind was what was uppermost in the minds of both counsel and court, and this was the only question that the case decided. It does not appear in the opinion of the court that any objection had been made to the legislative rate on the ground that it was unreasonably low or confiscatory. All that was said, therefore, as to the uncontrolled discretion of the legislature was *dicta*. In the other cases which were decided with Munn v. Illinois, and which are collectively known as the Granger Cases, it is also to be observed that the amount of the rate fixed by law was not the bone of contention. In the first of the group, the court merely decided that railroads are carriers for hire, and hence, under the ancient common-law doctrine set forth as the basis of the decision in Munn v. Illinois, they are subject to public regulation.[5] The opinion of the court gives no indication that it was called upon to determine whether the rate in question was reasonable or not. In the next case much the same question was presented, the only additional point being whether the power of the state to regulate railway charges was limited by a clause in the company's charter authorizing it "to demand and receive such sum or sums of money for the transportation of persons and property, and for storage of property, as it shall deem reasonable." The court held that this was controlled by a provision in the state constitution in force when the charter was granted to the effect that all acts for the creation of corporations within the state "may be altered or repealed by the legislature at any time after their passage."[6] Here, again, nothing is said in the opinion as to the reasonableness of the legislative rate, nor was this point mentioned in the other three cases in the Granger group.[7] Hence it seems erroneous to cite the Granger Cases, as is so often done, in support of the doctrine that the fixing of rates is wholly within the discretion of the legislative body. To be sure, there is unequivocal language in those cases to that effect, but it was unnecessary in any of them to the decisions that were made, and indeed has no bearing on the immediate point in controversy. Ten years later, when the *dicta* of the Granger Cases as to the bearing of state rate laws on interstate commerce were cited in support of an

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[5] Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) (1876) 94 U. S. 155, 24 L. ed. 94.

[6] Peik v. Chicago & N. W. R. Co. (1876) 94 U. S. 164, 24 L. ed. 97.

[7] Chicago, M. & St. P. R. Co. v. Ackley (1876) 94 U. S. 179, 24 L. ed. 99; Winona & St. P. R. Co. v. Blake (1876) 94 U. S. 180, 24 L. ed. 99; Stone v. Wisconsin (1876) 94 U. S. 181, 24 L. ed. 102.

Illinois statute regulating the local charge on an interstate shipment, the court declined to recognize that it was bound by what was then said. Mr. Justice Miller explained the decisions in those cases in these words:

> Of the members of the court who concurred in those opinions, there being two dissentients, but three remain, and the writer of this opinion is one of the three. He is prepared to take his share of the responsibility for the language used in those opinions. . . . It was strenuously denied, and very confidently by all the railroad companies, that any legislative body whatever had a right to limit the tolls and charges to be made by the carrying companies for transportation. And the great question to be decided, and which was decided, and which was argued in all those cases, was the right of the state within which a railroad company did business to regulate or limit the amount of any of these traffic charges. The importance of that question over-shadowed all others.[8]

While the distinction between the decision and the *dicta* in the Granger Cases should be readily apparent to any lawyer, it is not surprising that the language used by Chief Justice Waite, who wrote the opinions in those cases, should have conveyed the impression to others that the fixing of rates to be charged by public-service companies was not only a legislative act, but that there was no limitation upon the legislative discretion. Hence the states began to use the power of which they believed themselves to be possessed, and the years immediately following the Granger Cases are marked by great legislative activity. The court had intimated in one of the Granger Cases that a far-sighted corporation might have molded its charter in such a way as to reserve to itself absolutely the power to fix rates, and such a charter would constitute a contract under the protection of the contract clause of the Federal Constitution.[9] It was not long until a railway in Illinois acted upon this suggestion and set up the claim that its charter was a contract with the state, and that since its charter authorized its board of directors to fix rates, any attempt by the legislature to exercise this function was an impairment of a contract right in contravention of the Federal Constitution. The opinion of the court overruling this contention is confined to this one question, and Justice Field, who wrote the dissenting opinion in Munn v. Illinois, now prepared a brief concurring opinion in which he said:

> I concur in the judgment in this case solely on the ground that no proof was made that the rate prescribed by the legislature was unreasonable. Under previous decisions of the court the rate is to be taken as presumptively reasonable.[10]

The next year a water company in California, the charter of which provided that its rates should be fixed by a board on which the company was represented, set up the claim that any attempt on the part of the state to fix its rates through any other agency was a violation of its contract right. But the court decided that this contention was not well founded, since the constitution of California expressly reserved the right to modify or amend any corporate charters that might be granted. In view, however, of the loose language used by the court in the Granger Cases as to points which were not then before it, the following sentences from the opinion in this case are very significant:

> That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77. As was said in that case such regulations do not deprive a person of his property without due process of law. What may be done if the municipal authorities do not exercise an honest judgment, or if they fix upon a price which is manifestly unreasonable, need not now be considered, for that proposition is not presented by this record.[11]

Two years later the court was again asked to decide that a railway charter was a contract, and that the establishment of a railroad commission with authority to fix rates was a violation of that clause of it which empowered the company "to fix, regulate, and receive the tolls and charges by them to be received for transportation." But the court held that this provision was no indication of any intention on the part of the state to bargain away its power over the rates of public-service companies. By this time,

[8] Wabash, St. L. & P. R. Co. v. Illinois (1886) 118 U. S. 557, 568, 30 L. ed. 244, 248, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

[9] Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) (1876) 94 U. S. 155, 162, 24 L. ed. 94, 95.

[10] Ruggles v. Illinois (1883) 108 U. S. 526, 541, 27 L. ed. 812, 818, 2 Sup. Ct. Rep. 832.

[11] Spring Valley Water Works v. Schottler (1884) 110 U. S. 347, 354, 28 L. ed. 173, 176, 4 Sup. Ct. Rep. 48.

however, the court had been impressed by the dangerous consequences of its *dicta* in the Granger Cases as to the power of the states to regulate rates, and it now enunciated another *dictum* as a corrective. The court said:

> From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounted to a taking of private property for public use without just compensation, or without due process of law. What would have this effect we need not now say, because no tariff has yet been fixed by the commission, and the statute of Mississippi expressly provides "that in all trials of cases brought for a violation of any tariff of charges, as fixed by the commission, it may be shown in defense that such tariff as so fixed is unjust." [12]

In still another significant passage, which has less of the character of a *dictum* because it applies to a point raised in argument, the court said:

> General statutes regulating the use of railroads in a State, or fixing maximum rates of charges for transportation, when not forbidden by charter contracts, do not necessarily deprive the corporation owning or operating a railroad within the State of its property without due process of law, within the meaning of the 14th Amendment of the Constitution of the United States, nor take away from the corporation the equal protection of the laws.[13]

After another interval of two years, the court was asked to decide a case in which the reasonableness of a legislative rate was squarely drawn in question. The state of Arkansas had fixed a maximum rate which was attacked by a carrier as confiscatory and in violation of the 14th Amendment. The court held, however, that the carrier had not made out its case, since it had offered no evidence as to the amount invested in the road by its present owners. It then uses this cautious language:

> Without any proof of the sum invested by the reorganized corporation or its trustees, the court has no means, if it would under any circumstances have the power, of determining that the rate of three cents a mile, fixed by the legislature, is unreasonable. Still less does it appear that there has been any such confiscation as amounts to a taking of property without due process of law.[14]

In the same year, a carrier attacked an act of the legislature of Georgia by which a railroad commission was authorized to fix maximum rates on the ground that this was a breach of the contract between the carrier and the state embodied in the carrier's charter. The court did not so construe the charter. No question was raised as to the reasonableness of the rate fixed by the state.[15]

It will be observed that in only one of the cases brought before the Supreme Court down to this point had the question of the reasonableness of the legislative rate been so raised as to call for any decision as to the power of the court to review the rate, and in that case the court declined to pass upon the question, on the ground that the carrier had not established the necessary facts upon which its right to have the rate set aside, if any such right existed, must depend. Such was the state of the decisions when in 1890 a case was presented in which the court was required squarely to meet this question and decide it.

The state of Minnesota enacted a law providing that all charges made by any common carrier, subject to the act, should be "equal and reasonable." A railroad and warehouse commission was established with power to investigate the charges of carriers, and when these were found to be in violation of the act, the commission was authorized to compel any common carrier to change the same, and to adopt such charge as the commission should "declare to be equal and reasonable." The commission had exercised this power and had prescribed rates on certain products. The carriers claimed that this was a violation of the contract contained in its charter, and also contrary to the 14th Amendment. The first contention was easily disposed of by the decision in Stone v. Farmers' Loan & T.

[12] Stone v. Farmers' Loan & T. Co. (1886) 116 U. S. 307, 331, 29 L. ed. 636, 644, 6 Sup. Ct. Rep. 334, 388, 1191.

[13] Id. 335.

[14] Dow v. Beidelman (1888) 125 U. S. 680, 690, 31 L. ed. 841, 844, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028.

[15] Georgia R. & Bkg. Co. v. Smith (1888) 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47.

Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 344, 388, 1191. But the second contention required closer examination. It had been held by the supreme court of Minnesota "that the expressed intention of the legislature is that the rates recommended and published by the commission (assuming that they have proceeded in the manner pointed out by the act) should be not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are lawful or equal and reasonable charges; that, in proceedings to compel compliance with rates thus published, the law neither contemplates nor allows any issue to be made or inquiry had as to their equality and reasonableness in fact." This was an authoritative interpretation of the statute, and was not open to question when the case came before the Federal Supreme Court. The issue was thus squarely raised for the first time since the adoption of 14th Amendment, and having declared that the railway's charter was not a contract with the state, the court was obliged to determine whether the act of the Minnesota legislature deprived the carrier of property without due process of law. After rehearsing the decision of the Supreme Court of Minnesota to the effect that while the statute forbade the carrier to establish rates that are unequal and unreasonable there could be no recourse to the courts if the commission chose to establish rates that are unequal and unreasonable, the court said:

> This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.[16]

[16] Chicago, M. & St. P. R. Co. v. Minnesota (1890) 134 U. S. 418, 456, 33 L. ed. 970, 980, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

Three of the judges dissented. Their spokesman, Justice Bradley, clearly indicated the line along which the court divided in these words:

> When the legislature declares that the charges shall be reasonable, or, which is the same thing, allows the common-law rule to that effect to prevail, and leaves the matter there, then resort may be had to the courts to inquire judicially whether the charges are reasonable. Then, and not till then, is it a judicial question. But the legislature has the right, and it is its prerogative, if it chooses to exercise it, to declare what is reasonable. This is just where I differ from the majority of the court. They say in effect, if not in terms, that the final tribunal of arbitrament is the judiciary; I say it is the legislature. I hold that it is a legislative question, not a judicial one, unless the legislature or the law (which is the same thing) has made it judicial, by prescribing the rule that the charges shall be reasonable and leaving it there. . . . The companies complain that the charges as fixed by the commission are unreasonably low, and that they are deprived of their property without due process of law; that they are entitled to a trial by a court and jury, and are not barred by the decisions of a legislative commission. The state court held that the legislature had the right to establish such a commission, and that its determinations are binding and final, and that the courts cannot review them. This court now reverses that decision, and holds the contrary. In my judgment the state court was right, and the establishment of the commission and its proceedings, were no violation of the constitutional prohibition against depriving persons of their property without due process of law.[17]

These quotations from the majority and dissenting opinions show that the difference between them was as to the meaning to be attached to the phrase, "due process of law," as used in the 14th Amendment. The minority held that the decree of a legislature or of a commission, even though not the result of any inquiry, was due process, while the majority, acknowledging without any qualification the right of the state to regulate the charges of public-service companies, on which point it followed the views expressed in the Granger Cases, held that the carrier could not be deprived of its property without a judicial hearing. In other words, since the right to due process is guaranteed by the Federal Constitution, it is open to the carrier to appeal to the courts for a review of the

[17] Id. 462, 463.

action of the organs of the state. The court expressed no opinion as to whether the rate fixed by the commission was reasonable or unreasonable. It was not the substance of the regulation, but the form of it, which the court held to be invalid.

The cases here discussed, especially the Minnesota case, have been the subject of a good deal of criticism, which, however, has been based in the main upon a misconception of what the several cases decided. The Minnesota case has been regarded as reversing the earlier decisions, and a recent writer even goes so far as to say that "this ill-balanced decision promised for a time to undo all the constructive work of years." [18] It unduly dignifies the *dicta* of any court to characterize them as "constructive work," but it was only the *dicta* in the Granger Cases and those succeeding them which were overruled by the Minnesota case. In the Granger Cases the question which, as Justice Miller said, "overshadowed all others," was the right of the states to regulate the charges of public-service companies. That right was upheld and has not since been denied by the United States Supreme Court in any case.[19] What the Minnesota cases added to the previous line of decisions was that such state regulation must not contravene the 14th Amendment, and that any attempt to preclude a resort to the courts for a review of the rate-making orders of a state commission did violate that Amendment.

Mr. Justice Swayze, of the Supreme Court of New Jersey, says of the decision in the Minnesota case:

> The real difference between Justice Blatchford and Justice Bradley was as to the question presented in a rate case. According to the former it was: "Is the rate a reasonable one, and such as would afford the same profit as could be realized by one not subject to regulation?" According to the latter it was: "Is the rate so unreasonable as to be arbitrary and amount to confiscation of property rather than mere regulation of a rate?" [20]

A careful examination of the majority and minority opinions fails to disclose any ground for the distinction indicated by Justice Swayze. In the opinion of Justice Blatchford there is not a word as to the reasonableness or unreasonableness of the rate fixed by the commission, nor is there anything in the opinion to indicate that a rate fixed by the state is unreasonable if it does not yield the same return as one not fixed by the state. The decision of the court is placed squarely on the ground that the action of the commission was a denial of due process of law because the statute, while making the orders of the commission final and conclusive, did not require it to grant a hearing, or issue a summons or notice to the carrier, or afford the carrier any opportunity to introduce witnesses or make any defense against the action which the commission proposed to take. So far as the law under which it was created was concerned, the commission was at liberty to evolve its findings out of its inner consciousness, and such findings, according to the Supreme Court of Minnesota, were final and conclusive. In the judgment of the minority, this was as it should be. Justice Bradley recognized that it was possible for the legislature or its agents to act so outrageously as to deprive parties of their property without due process of law. But he added that since the commission had given no evidence of intent to do injustice to the carriers, its action was not open to review. "Deprivation of property by mere arbitrary power on the part of the legislature," he said, "or fraud on the part of the commission, are the only grounds on which judicial relief may be sought against their action." In other words, in order to sustain a com-

[18] Ripley, Railroads, Finance & Organization, 314.

[19] In Atlantic Coast Line R. Co. v. North Carolina Corp. Commission (1907) 206 U. S. 1, 19, 51 L. ed. 933, 941, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398, a case shortly to be cited on another point, the court said, "The elementary proposition that railroads from the public nature of the business by them carried on and the interest which the public have in their operation are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine."

[20] "The Regulation of Railway Rates under the 14th Amendment" by F. J. Swayze in Quarterly Journal of Economics (1912) 389. Professor Ripley adopts Justice Swayze's view in his book cited in note 18.

mission rate it is only necessary to show that the commission acted honestly. Its orders, to be sure, may have deprived the carrier of all return on its property, and may have driven it into bankruptcy, but in the absence of "fraud," the carrier's only means of redress is the ballot box. Justice Swayze states that the view of Justice Bradley has finally prevailed, and in support of this assertion he cites Atlantic Coast Line R. Co. v. North Carolina Corp. Commission.[21] That case had nothing to do with the fixing of rates, but grew out of an order of the North Carolina commission that the carrier should furnish such facilities as were necessary in order to enable passengers to make convenient train connections at an important junction. The only way in which the carrier could comply with this order was to run an extra train on which there would not only be no profit, but an actual loss. In sustaining the order of the North Carolina commission, Chief Justice White, after saying that even if it could be conceded that a scale of maximum rates fixed by the state, and which as a whole was adequately remunerative, might be set aside because it contained some rates so unequal as to transcend the limits of just classification, or so unremunerative as to result in the creation of a favored class, went on to say:

> Neither of these concessions, however, can control the case in hand, since it does not directly involve any question whatever of the power to fix rates and the constitutional limitations controlling the exercise of that power, but is concerned solely with an order directing a carrier to furnish a facility which it is a part of its general duty to furnish for the public convenience. The distinction between an order relating to such a subject and an order fixing rates coming within either of the hypotheses which we have stated is apparent. This is so because as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result.[22]

This case, therefore, in so far as it has any bearing on the Minnesota case at all, certainly does not sustain the opinion of Justice Bradley that a rate fixed by a state legislature or commission is not open to judicial review.

Whatever doubt remained as to the power of the courts to review the rate-making orders of commissions was removed by the decision of a unanimous court in Reagan v. Farmers' Loan & T. Co.[23] In this case an entire schedule of rates prescribed by the Railroad Commission of Texas was called in question on the ground that they were unreasonable and unjust, and worked a destruction of the carrier's rights of property. A perpetual injunction was asked for. After reviewing several of their earlier decisions the court, through Mr. Justice Brewer, said:

> These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the 14th Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held.[24]

The court then examined the facts set forth in the record, from which it appeared that the railroad property had cost $40,000,000, and could not be replaced for less than $25,000,000: that

[21] (1907) 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398.
[22] Id. 26.

[23] (1894) 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.
[24] Id. 399.

there were mortgage bonds to the amount of $15,000,000 outstanding against it, and nearly $10,000,000 of stock; that no dividends had ever been paid on the stock, and that the road had been forced into a receivership because of default in interest on the bonds; that the earnings of the road during the last three years prior to the establishment of the new rates by the state commission were insufficient to meet operating expenses and interest on the bonds; that the road had been prudently managed; and that the new tariff of rates during the six or eight months that they had been in effect had resulted in a reduction of revenues of more than $150,000. On these facts the court said:

> Can it be that a tariff which under these circumstances has worked such results to the parties whose money built this road is other than unjust and unreasonable? Would any investment ever be made of private capital in railroad enterprises with such as the proffered results?

The rates were enjoined, and the court thus took the last step that was necessary to make all rate schedules established by public authority subject to judicial review. In its decision in Chicago, M. & St. P. R. Co. v. Minnesota, the court had looked only to the mode of procedure by which the state commission had fixed its rates, but in the Reagan case it was the substance of the rate, and not the commission's mode of procedure, which was the basis of the court's decision. Thus while the right of the public to regulate public-service companies has been amply recognized, the property invested therein and representing the saving of thousands of people is protected in some measure against administrative fiats and legislative decrees. As was to be expected, these results have not met with the approval of a certain type of lawmaker, and when the court decided that a statute declaring that the conclusions of commissions should be final would be set aside, the same result was sought by the imposition of penalties so heavy as to deter recourse to the courts. No better success attended this measure,[25] and it may now be taken to be established law that no carrier can be compelled to submit to a schedule of rates until it has first had its day in court.

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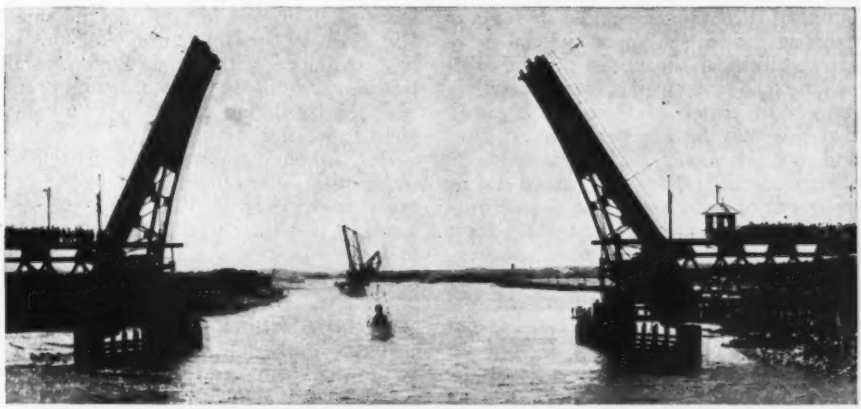
[25] Ex parte Young (1908) 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Willcox v. Consolidated Gas Co. (1909) 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Missouri P. R. Co. v. Nebraska (1910) 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989; Chesapeake & O. R. Co. v. Conley (1913) 230 U. S. 513, 57 L. ed. 1597, 33 Sup. Ct. Rep. 985; Wadley Southern R. Co. v. Georgia (1915) 235 U. S. 651, 59 L. ed. —, 35 Sup. Ct. Rep. 214.



DOUBLE BRIDGE OVER CAPE COD CANAL,

which connects Buzzard's Bay and Cape Cod Bay. The canal, which is eight miles long, was constructed by a private corporation at a cost of $12,000,000.

Government by Commission

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TOO often, I think, are we prone to accept without question governmental developments which have radically changed the existing order, but which have come about gradually,—in retrospect, it seems almost inevitably,—and are a great improvement over old, inadequate methods. Had the change been made abruptly, the conservative mind would have objected vigorously; but the slow growth and improved efficacy of the new *regime* prevent much speculation as to its inner significance, and the underlying principles of the political adjustment—ofttimes metamorphosis—which has taken place, receive but scant consideration.

American political history affords frequent instances of the truth of this generalization; yet the most important, I think, may be grouped in one class, since they signify the gradual abandonment as a governmental *modus operandi* of the famous and oft-quoted injunction in the Massachusetts Constitution, that "the legislative department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise the legislative or judicial powers or either of them; the judicial shall never exercise the legislative or executive powers or either of them; to the end that this may be a government of laws and not of men." Chief among the changes which show this creed to be sadly out of date is the rise of administrative boards, of which, so far, the most important, as well as the most conspicuous, are the public service commissions.

For the Montesquieu theory of the separation of powers as expressed in the Massachusetts Constitution, I hold no brief; it was founded upon a false appreciation of English conditions, and as a political axiom no longer finds acceptance save in the United States and a few of the South American Republics. The state Constitutions in this country have explicit provisions for three departments of government; the Federal instrument tacitly accepts the principle in the three articles following the preamble, although strict adherence cannot be maintained. Two illustrations of departure at once come to mind: the legislative veto power of the President and the executive functions of congressional committees. And, in fact, with political and economic life as it is to-day, absolute acceptance of the *dictum* is manifestly impossible; yet it remains true that the separation of powers has been, and is, a characteristic feature of the American governmental system. The overlapping of the three departments is a contingency to be guarded against.

Of not so certain meaning, however, is the phrase "government of laws." We are safe in assuming that the framers of the Massachusetts Constitution intended to shelter certain privileges and rights under a written instrument more immutable than ordinary statutory rules; but they probably did not stop there. They very likely intended, furthermore, to insure automatic action,—that is, a minimum of discretion in applying the rules laid down by the legislature. And this is in accordance with Anglo-Saxon legal traditions as opposed to continental practice; the legislature should make a complete expression of its will.

But, although statutes have multiplied enormously (the output of state legislatures from 1909 to 1913 being 62,014 laws), it is neither possible nor desirable that the enactments should reach every possible situation and in every case be practically self-executory. A contrary ideal would seem to contemplate a mechanical state, and not to appreciate Burke's description of government as "a contrivance of human wisdom to provide for human wants." A "government of laws" is further qualified by the fact that

one cannot overlook the personal element in politics; for the average man a striking personality has a stronger appeal than a technically perfect, all-embracing statute. But apart from these considerations, the Anglo-Saxon theory, as embodied in the Massachusetts Constitution, is that the expression of legislative will should be complete, and this ideal is rapidly becoming more and more impossible of realization. The rise of government by commission means, then, a radical departure from the Montesquieu doctrine of separate powers, and a devolution of authority to carry out an incompletely expressed legislative will. The result is a substantial intermingling of executive, legislative, and judicial functions, and the courts have often been hard pressed to define rationally the powers which the commissions exercise. They are something more than executory; they cannot be judicial, since the commissioners are not judges, and they should not be legislative, since it is an accepted maxim of American constitutional law that delegated power cannot be delegated. The truth is, however, that, in carrying out the policy of the legislature as to the subjects committed to their control, the commissions are administrative courts, almost in the continental sense; they build up a body of precedents and law which differs from that applied in the ordinary courts, but, contrary to the continental practice, the American commissions are subject to control by the judiciary. Their findings on questions of fact are, generally speaking, accepted as final, but their orders can be vacated by the ordinary courts on the grounds, among others, that they infringe constitutional guaranties, or are *ultra vires*.

LINDSAY ROGERS

Curiously enough, Massachusetts was the state to initiate this comparatively recent departure of government by commission. In 1837, a state board of education was established, and from then until 1890, nearly thirty fields of administration were placed under the control of appointed boards which exercised powers of varying extent. In 1891, Governor Russell, addressing the legislature, declared: "With much truth Massachusetts has been described as a commission-governed state. Its great departments of education, health, charities, prisons, reform schools, almshouses and workhouses, agriculture, railroads, insurance, fisheries, harbors, and lands, savings banks, and others, are governed by independent boards practically beyond the control of the people. . . . Almost without exception the members of these boards are appointed by the governor, but only with the advice and consent of nine other men. Their tenure of office is usually for a term of several years, often without power of removal by anyone, sometimes subject to removal for cause or otherwise, by the governor with the same consent. . . . The subordinate officials are generally appointed by the boards. These boards and their work are practically beyond the control of the people, or of anyone immediately responsible to them, except in the limited power of the governor occasionally to appoint a single member. The people of the state might have a most

decided opinion about the management and work of these departments, and give emphatic expression to their opinion, and yet be unable to control their action. The system gives great power without proper responsibility, and tends to remove the people's government from the people's control."

When one looks back over the industrial history of the United States, however, the rise of public service commissions seems to have been inevitable. In state politics there have been few chapters of more interest, and more shame, than that which relates to the regulation of public utilities. At first they received enormous concessions from the state and expanded unchecked; then legislative regulation as to franchises, and, on the ground that the businesses were affected with a public interest, as to rates, proved a failure, for too often effective control was exerted not by the legislature, but by the corporations themselves. There was much corruption, and even if the legislature was desirous of passing a strictly regulative measure, the effectuation of the desire was not possible, since statutes could not be framed to prevent all sacrifices of the public interest for unmerited private gain, and acts unfairly inimical to a cempetitor. So the legislature shifted its responsibility to a commission with duties of a mixed character, which should carry out the legislative will defining the general conduct of these public service corporations. In this particular branch of government by commission, the state of New York was the pioneer, establishing a railroad commission in 1855. Massachusetts followed in 1869, but the former experiment was unsuccessful. In New York, however, the problem was most acute, as is natural by reason of the services necessary for the congested population, and the state was the first to begin commission regulation upon an extensive scale. Wisconsin acted at the same time (1907), but the New York law as amended in 1910, 1911, and 1912, probably delegates most comprehensive powers, the commission being authorized to regulate rates and service, to make investigations, require reports on business condition and accidents, pass on mergers, security issues, and prosecute for violations of the law or administrative orders.

That these powers are enormous may be seen by reflecting for a moment on the character of the corporations regulated. Public services are the most vital of all businesses, as was early recognized by the obligations which the common law imposed upon them. Without municipal and state traction companies large cities would be impossible; suburban development could not exist; commerce would as yet be in its infancy. Lighting facilities are essential not only to comfort, but to business. The investments involved are great; the employees affected are legion. All are under the control of state and municipal commissions. Congress, moreover, has delegated authority over several of the subjects under its control. The Interstate Commerce Commission regulates the railroads of the country, although, as yet, with not such comprehensive powers as those possessed by the New York board; but in 1913 the cost of administration was over a million and a half dollars. The newly established Interstate Trade Commission is to supervise commercial corporations,—businesses not affected with a public interest; the banking system of the country has been handed over to the Federal Reserve Board, and under the recent Newlands act, sweeping powers (certain to be increased in the near future) have been given the Board of Mediation and Conciliation.

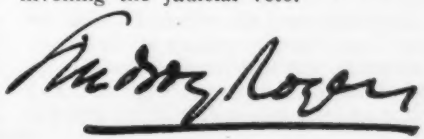
It will be accepted without question, I think, that only through special boards, with expert knowledge, permanence of tenure, and in practically continuous session, can effective regulation of these subjects be secured. And with the inevitable increase of social legislation, providing for workmen's compensation, old age pensions, unemployment insurance, minimum wages, factory supervisions, and remedial and corrective devices of a similar character, there will arise new situations which can only be met by commission control. The legislature can only formulate an ideal; administrative courts must carry it out.

I have already indicated that the judicial veto may be invoked to check unrea-

sonable and ill-considered action on the part of these commissions. Some of them, it is true, exercise powers which are purely ministerial and innocuous; but in spite of the judicial bulwark there lurks a real danger in the existence and operation of this fourth department of government, for in democracies there is a consistent distrust of officials who are outside of popular control, and commissions appointed by the executive for definite terms, and removable only by him upon charges, are not responsible to the body from which they get their power or to the people. It is with difficulty, therefore, that the commissions obtain and keep popular confidence. Various remedies have been suggested. It is proposed, for example, that the commissioners be subject to the recall as is the case with elected officials, but the consequences of such a device would certainly be grievous. The scientific work which the administrative courts have to do should not be controlled by a wavering public opinion; it should follow a program announced by the legislature as representing the well-considered desires of the people. And with adequate salaries, the selection only of experts, or men capable of becoming experts, security of tenure, and elimination of political considerations, much may be accomplished toward making the administration represent the best desires of the people, although it may remain irresponsible. But, in the last analysis, as Mr. Herbert Croly points out: "The best way to popularize scientific administration, and to enable the democracy to consider highly educated officials as representative, is to popularize the higher education. An expert administration cannot be sufficiently representative until it comes to represent a better educated constituency." [1]

In commission regulation of business, there is, finally, a peculiar danger which does not exist in the control of industrial relations and social relief. I refer to the fact that private ownership and public management of corporations are inherently inconsistent. A high decree of efficiency is the dominant characteristic of the huge, privately owned businesses. But individual initiative can be demanded and economies encouraged only when responsibility is concentrated. Under commission control the interest of the corporation is hostile to the interests of the public; responsibility is divided. The way out of this dilemma would seem to be personal, and to lie in co-operation between the agents of the public and the managers of the corporation. The commission control must preserve efficiency; it must be regulation rather than management, and, above all, never tutelage. A real problem exists, and if it cannot be solved, public ownership will supplant private ownership under inefficient public control.

We have, in conclusion, traveled a long way from the Anglo-Saxon ideal of statutes which are the complete expression of legislative will; administrative commissions form a fourth department of government. As yet, the most important subject under their control is business affected with a public interest, but the rapid increase of social legislation means that our industrial and economic relations are also to be regulated by commissions, which mark the abandonment of the Montesquieu theory of separate powers and the acceptance of a government of men. Yet the outlook is not depressing; foreign experience presages a successful *regime*. Individual liberty and property rights have not been unreasonably interfered with in England, where for sometime Parliament has been delegating its powers, and statutory orders and commissions have been on the increase, both in number and importance. On the continent administrative courts have long been a characteristic feature of the governmental system. In our own country we have the safeguard of written Constitutions; but we may hope that with better educated constituencies, and with a greater appreciation of the value and function of experts in administration, government by commission will become truly representative, and so efficient that there will be no need to check it by invoking the judicial veto.



[1] Croly, "Progressive Democracy," p. 377.

The New Penology

By HON. EDWARD J. McDERMOTT

Of the Louisville (Ky.) Bar

Lieutenant Governor of the State of Kentucky

[Ed. Note.—Owing to numerous engagements Lieutenant Governor McDermott was unable to send us his article in time to include it in the March "New Penology" number, for which it was intended. We take pleasure, however, in presenting this valuable and able paper to our readers in this issue.]

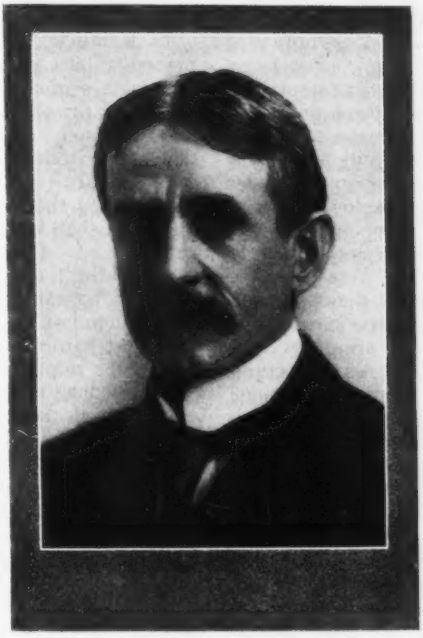
THE penologist must consider not only the statutes which define crimes and their punishments and the cardinal purpose of those punishments and the management of prisons, but also the procedure of the courts in which such punishments are adjudged and the proper exercise of the power of pardon or parole. Light punishments, if quickly, unerringly, firmly inflicted, are more effective as deterrents than severe punishments tardily, clumsily, and fitfully applied.

In the reign of George III. there were at first 67 offenses for which the punishment was death. During his reign 156 other crimes (some only slightly immoral) were also made punishable by death. These barbarous laws did not stop crime. In the Bristol jail one clergyman attended 167 men that were hanged, and 164 of them, before offending, had seen others hanged. The penalty had not deterred them. There can be no exact equivalence between the crime done and the punishment; but there must be some reasonable approach to equality between them. The more heinous the offense the heavier must be the punishment, but not heavier than sufficient to deter men from criminal acts.

The public and the criminal should be able to see that the penalty of the law is reasonable, and that it is enforced justly and promptly, if it is to be respected, and if it is to deter criminals and the mob effectively. Robbery decreased 39 per cent and burglary decreased 34 per cent in Chicago from 1905 to 1909, because such crimes, being dreaded and hated by the public, were swiftly and severely punished; but the number of pickpockets and swindlers, always shrewd and often of a respectable appearance and connections, increased, because such men often escaped from a lack of good proof against them, and because their crimes do not excite great public dread or odium. Boys and criminals will take big risks, if punishment is not sure or if it seems far off. The primary purpose of public punishment is to prevent a criminal act by creating a restraining fear of the consequences. The secondary purpose of such punishment, in the case of adults in prison, is to reform them by rational treatment,—to curb their criminal propensities and make them trustworthy citizens,—and that is humane and expedient, though the results of reformatory treatment often seem hardly commensurate with the care and expense. Prisoners must not be brutalized nor be treated with cruelty; but sometimes in our eagerness to be tender and merciful to adult criminals, we are unjust to innocent victims and to honest, law-abiding taxpayers, whose wrongs and increasing tax burdens are too often overlooked. If we cannot make the criminal see that his act is immoral, we must at least convince him that it is dangerous to him,—that it does not pay.

I cannot agree with those alienists or sociologists who say that practically all

crime is due to mental disease or unfavorable environment, or to an impulse that cannot be resisted and is therefore excusable. There is some truth in this theory, of course. But, if logically followed, it leads to absurdities. If no criminal is sane, none should be punished. Some men, from conscientious principles, obey the laws of God and the State; others disobey, or obey only from fear of punishment and disgrace. Excepting some men plainly of unsound mind, we know that our wrongful acts are nearly always done with knowledge of their character, and because we do not choose to resist temptation. Knowing what is right, we do what is wrong from passion or selfishness or some other bad motive. Nature relentlessly punishes every violation of its laws. The State must usually do the same, unless the thrifty, the peaceable, the upright, the moral shall bear increased public burdens and unnecessary private wrongs. No society can thrive or be content where the vicious and the passionate uniformly arouse active sympathy, and are freely given protection from the natural consequences of their ill doing. If society or the State shall, at a heavy expense to the fit, tenderly care for the unfit, and protect them from the natural consequences of their immoral acts or omissions, society cannot advance by the survival of the fittest. It is said that a part of the criminal's earnings should go to his family, who are deprived of his support and who were not responsible for his guilt. But what of the poor man who has been robbed, or the widow and orphans whose breadwinner has been desroyed by murder? Who pleads for recompense to these innocent victims?



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There are some good people that think crime is mainly due to the lack of education. It is more often due to the want of moral training and good example in the home, the school, and the church. I believe in free will; and yet it may be true that many criminals are unfit to play a proper part under the hard and exacting conditions of highly civilized life. Therefore crime will continue in spite of education, enlightenment, and the opportunities of modern society. The better qualified may therefore have the duty of protecting and helping the less qualified. To the slight offender, especially if he be a first-offender, we must keep open the door of hope, the chance of redemption. In the Times of Louisville, Jefferson county, Kentucky, on March 20, 1914, this statement appeared:

"Beauties of Education."

"College graduates outnumbered illiterates in the Jefferson County jail at the ratio of 8 to 6. A census of the white prisoners taken for the board of education to-day by Frederick Hess, truant officer, showed that only one of the 73 prisoners was opposed to instruction in the jail night school which Jailer Charles C. Foster has asked the board of education to establish behind the bars for the prisoners. The census of white prisoners showed 8 college graduates, 8 high school graduates, 6 illiterates, and 51 whose education averaged

through the fifth grade. A census of the blacks, who form by far the largest part of the jail population, will be taken later."

It appears from statistics that there are more crimes against "*property*" in winter, and more against "*persons*" in summer. Hard times produce an increase in crimes against "property." Some writers insist that the quantity of crimes in any country does not vary much; that it varies mainly in its form. It is said that all our efforts to stop crime or to reform criminals have only prevented a threatened increase of crime; that our reforms have only offset the bad effects which imprisonment under injurious conditions would otherwise have produced; that our only hope is that "social justice" may remove the motive or cause of crime. Are there no crimes except by the poor, the oppressed, and the ignorant? Are there no rich and educated criminals,—no criminals who have comforts, power, good opportunities, and freedom from oppression? Luxury, which enfeebles men and nations, begets more vices than poverty. Some students of penology, and some good men and women interested in prison reform, are too sentimental and quixotic. Convicts cannot be treated like gentlemen, nor even like honest men, but they should be treated like human beings, having some rights and some claims on our charity. Their health, their infirmities, their mental, moral, and physical needs, should have our reasonable care. Many are not without virtues and good traits. A few are too severely punished for a moments weakness or a moment's yielding to a burst of passion. Some later become good citizens. To punish them harshly or too severely for a mere failure to do their labor tasks as well as we think such tasks should be done is wrong. We too often forget their inferior mental, physical, and moral capacity, and expect too much. It is not uncommon for one convict that is quick and skilful to help his friend, this is slower and less efficient in the shops, and that might otherwise be punished in some way for a failure to complete the required tasks. Where the State provides for an "indeterminate sentence" and for a "parole" of a prisoner that maintains a good record for obedience to prison rules and requirements, it will happen that shrewd, skilful, handy convicts of the worst type, and with two to five previous convictions for crime, will earn a parole quicker than a dull, unskilful first-offender whose record is not good merely because he is unable to perform labor tasks efficiently.

In Kentucky, the legislature of 1910 passed an act providing for an "indeterminate sentence" and an act for the parole of prisoners with a good record in the prison. The latter act provided that "no prisoner . . . shall be eligible to parole . . . until he shall have served the minimum term . . . unless he shall have been obedient to the rules . . . for at least nine consecutive months," etc. Under that act the court of appeals held that the penitentiary commissioners had no discretion, and must parole every prisoner that had served the minimum term and that had been "obedient to the rules." That meant only that, if the prisoner should be of good behavior and should perform his allotted tasks for the prison contractors for nine months, he should be automatically entitled to his parole, even though he had previously served four or five terms in some penitentiary and gave no sign of reform. On the other hand, a first-term man who had obeyed all the rules except that he had not performed his daily labor task for nine months might be kept in prison for his maximum term. It was unjust and unwise, but the court felt bound to make that ruling under the terms of the act. About 600 convicts were at once set free, though some of them were known to be hardened criminals with a long record of crime. In 1914 I prepared and helped to pass two new acts, one for an "indeterminate sentence" and one for "a parole system" which restored to the commissioners a necessary discretion, and required the governor's approval of each parole granted. Kentucky seems resolved to abolish the contract-labor system in a year or two, but that subject is beyond my present limits.

Under the Constitution of Kentucky, the governor has the power "to remit fines and forfeitures, commute sentences,

grant reprieves and pardons except in cases of impeachment," etc. Under that provision the legislature does not seem to have the right to confer on prison commissioners the power to grant a parole; and, in truth, it is best to require the governor to approve or reject a parole, because the responsibility for such act should rest on the highest officer of the state, not be distributed among three or five men, especially if they get their authority by appointment. Whenever responsibility is divided, it is impossible for the people to know whom to condemn, or to be able to make their condemnation effective. Governors will now and then give undeserved pardons, but the proper remedy is not the creation of a pardon board. The best remedy is for public opinion to note the governor's fault at once, and to make him conscious that his act is strongly and justly condemned. He cannot stand such firm, intelligent censure.

While performing the duties of acting governor of Kentucky, I have given much time and study to innumerable appeals for pardons. The first thing that impressed me was the unreasonable severity in the penalties often inflicted upon poor and friendless criminals for offenses not grave, and sometimes I was surprised at the conviction of the accused on very flimsy testimony. For example, two men were arrested for getting into a factory through a window with intent to steal some sugar. One was allowed to plead guilty to a misdemeanor charge, and was sent to the county jail for four months; the other was sent to the penitentiary for seven years. A young man was charged with seduction and sent to the penitentiary on the unsupported word of the young woman, though he protested his innocence and charged that an older lover was the guilty person. A year after the young man had been sent to the penitentiary, another child appeared, and then the young woman charged the offense to the old lover, who fled from the state and was never tried. Sometimes when seduction has probably been committed, the young woman, to escape the wrath of her family and the condemnation of the public, will charge rape. A jury will convict any man on the sole word of the woman involved, unless some strong contradictory testimony is at hand. The governor has the power to rectify, and should rectify, the injustice done in such cases as those mentioned. In one case in which a man had been convicted of carrying a concealed deadly weapon, I refused a pardon with this statement:

"It is not proper for the governor to overrule the verdict of the jury merely because he would have rendered a different verdict. He should interfere with such a verdict only when he is convinced by the record that a fair trial has plainly not been had, or that the verdict is flagrantly against the evidence, or that evidence later discovered clearly shows a mistake, or that the judgment, though correct according to general legal rules, is nevertheless inequitable or unjust by means of special or exceptional features.

"It is so important to the state that the carrying of concealed deadly weapons should be discouraged, and that manslaughter should be diminished by a strict enforcement of the law against manslaughter and murder, that I cannot consent to set aside a judgment where the punishment has not been excessive.

"It is hard to resist the appeal for mercy by the convicted man and his family or friends, but there has been much complaint of the courts for a failure to convict guilty persons, and, when a jury and a court, after hearing the evidence, have convicted the accused, the duty of upholding the courts and the law for the protection of life and property ought to rest heavily upon the chief executive of the state.

"The pardoning power allowed to the governor imposes on him a grave duty under his oath of office. I feel the weight of that obligation, and I cannot ignore or weakly discharge it, merely at the prompting of sympathy or at the appeal of the family and friend of the man condemned by the jury and court."

Many of the benefits of a parole law can be obtained by a governor's "conditional pardon." Most of the pardons I granted when acting governor were of this kind, and stipulated that, if the convict should ever thereafter be convicted of any crime in the state, the pardon should be void, and he should be recon-

fined to serve the remainder of his unexpired term. In each case the convict was required to accept the condition in writing before his release. None of them, so far as I know, has ever violated the law and forfeited his pardon. A dose of prison life for a moderate time, and a pardon with a string to it, have seemed to curb the evil spirit.

The student and advocate of the New Penology, while condemning the barbarities of olden times and the undue severities of even the present day, must nevertheless be temperate in pressing reforms, thinking not only of the criminal and his family, but remembering also the innocent victims of crime and the humble taxpayer who is too often forbotten, but whose back must bear most of the burdens of extravagance and waste in all the departments of our government.

The Greeks and Romans did not use imprisonment as a punishment. Their usual penalties were fines, banishment, and death. In that time, banishment was terrible. Decius Silanus wanted Catiline's fellow conspirators punished with death; but Caesar, who was suspected of some sympathy with them, pleaded for perpetual imprisonment, which Cicero opposed on the ground that it would be worse than death, saying: "Vincula, vero, et ea sempiterna, certe ad singularem pœnam nefarii sceleris inventa sunt." In the Middle Ages and down to the middle of the last century, the treatment of prisoners, especially of political prisoners, was horrible. We may well rejoice that the appeals of charity and humanity have of late reached the public conscience and prepared the way for a better policy.

Edward J. McDermott

STORAGE YARD FOR SUBWAY ELECTRIC TRAINS AT CAMBRIDGE.

"All Men Are Created Equal"

BY WILLIAM M. BLATT

Of the Boston Bar

THE United States has at last made a real, epochal, and original contribution to the conceptions of government and jurisprudence. Strangely enough, this discovery is the exact opposite of the principle which at the beginning of the Republic was considered the cornerstone of the new order. The Declaration of Independence announced the birth of a nation which was to be based upon the proposition that all men are born equal. In its larger application this dogma meant that all persons are entitled to the same privileges and are subject to the same duties, without regard to social, financial, or racial prominence. The idea, though not new, had never before been so sincerely taken as the motto of a State; and though even the most enthusiastic realized that both in theory and in performance it was an unreal ideal, yet it was undoubtedly the moral goal of the framers of the Declaration and the general sentiment of the country down to a very few years ago. It formed one of the great issues of the Civil War—perhaps the only real issue; for, though negro emancipation was an obvious example, state subjection to the Union was also an expression of the principle that all parts of the nation ought to be satisfied with the same laws and the same administrative policies.

Not until within the last decade has it dawned upon the American people that this doctrine, like so many other doctrines which we adopted from the French revolutionary literature, was an illogical, impractical fallacy. All men are not created equal. Taking the words literally, nothing can be farther from truth; but even assuming, as most people do, that the phrase is a French exaggeration of the doctrine of equal rights and privileges, we are learning, nay, have learned, that it is just as much a bit of Gothic mysticism as any of the delusions of the Middle Ages. As a noble and chivalrous longing for the true spirit of democracy, the dogma of universal equality, like its sisters, universal liberty and universal fraternity, is an admirable phase of the human and especially of the Frankish mind; but, like all other fallacies, however high-minded in conception, it must result finally in disaster. And so it has. For by the determined effort to stand by it in our political structure we have involved ourselves in a deplorable social and economic predicament,—especially deplorable because we have thereby sapped the strength of the very cause which we have been trying to preserve, and fallen behind other modern nations in the very race which we have been most anxious to lead.

By way of compensation, however, we have not only reacted from one corollary of the ancient formula, but are on the verge of announcing through our courts and legislators another and almost an opposite one, that may in time extricate us from our present entangled position.

In order to understand just what has happened, it is necessary to consider in the modern spirit certain peculiarities of a most fascinating economic type,—the merchant.

Many writers have traced the growth of the merchants and their influence on civilization. In some pages they figure as angels of light, fighting the rapacious nobles, the fanatical and superstitious clericals, and the tyrannical kings of early days, and, by their shrewd common sense, moving art, science, and government along sound and progressive lines. Detractors, on the other hand, do not hesitate to say that the supremacy of the merchant marks the decay of the nation, that the order of economic revolution is the successive control of the farmer, the priest, the soldier, the king, and the

financier, and that when the last of these stages is reached, honesty, energy, imagination, art, courage, and opportunity are at their lowest ebb.

The truth undoubtedly is that the merchant type is simply a group with a certain special tendency towards self-preservation. Self-preservation is the keynote of all groups, even of the Crusaders, who, as has been shown, were actuated by the magical power they expected to derive from the possession of the holy relics. Self-preservation in different groups, however, takes various forms or means. The military power uses force and arms; clerical organizations, when acting selfishly as economic units, resort to intimidation by threats of invoking the wrath of supernatural beings; and the commercial element depends upon the manipulation of its principal weapon, money. The methods of using money are bribery of the executive, legislative, and judicial officials; corruption of the opinion-forming sources (newspapers, ministers, politicians, teachers, etc.) by the use of various sorts of financial pressure, and controlling the currency so as to affect prices and public confidence.

It is useless to consider whether the merchants are an evil element or a benevolent one. They follow the trend of human nature, like all other groups of the race. The problem of the economist is to note just how each group acts, and to study the relative value of each particular tendency in its influence on the general welfare of mankind. We cannot change instinct suddenly, perhaps not at all, but we can decide what special manifestation of it ought to be curbed, and how.

In the past, for example, the activity of the commercial class resulted beneficially in repressing the religious hysteria which was rampant in Europe from the tenth to the fourteenth centuries; they helped to remove the ban from science; they created a love for the art products of the East; they made human life safer; they opened paths for the social and intellectual advancement of the humbly born; they united and are still uniting the whole world in a common federation, so that to-day one can travel to remote corners of the earth, and obtain without trouble most of the commodities and conveniences at nearly the same prices as at home; and they bring to each nation the vivid objective evidence of improvements in all branches of human striving. They have in this way substituted a competition for excellence among the nations, which will in time perhaps replace, or at least overshadow, the ancient competition for power.

This is all very well. But it must be remembered that the merchants as a body have never sacrificed financial gain to public welfare, and so the ameliorations mentioned, and others which have come about through the mercantile pressure, have been forced into being because they coincided with the general course of traders' ambitions. They have been by-products. The primary product has always been money. And so we shall expect to find, and do find, many evil by-products. In fact the natural tendency is for any class or group to react upon other groups to their disadvantage. Each group is selfish, seeking to abstract from some other group, by force or guile, something of value, and of course, unless curbed by the other groups, would absorb all power and wealth.

There is no room here to enter upon a discussion of the principal social or law-making groups. Volumes have been written about them from various standpoints and according to various divisions, but my own classification places at the head of legislative forces the three great classes, two of which for convenience I have labeled with terms borrowed from Nietzsche. They are, first, the master group, consisting of the aristocracy, the financial leaders, and the political leaders continually working to control the machinery of government; second, the middle class, composed of the intelligent but unofficial types, educated and skilled men of the professions and more intellectual trades, who champion all laws and movements looking to the enforcement of fairness and humanitarian principles; and, third, the subject class, made up of the unskilled and the indigent, who exercise little influence on legislation because of their lack of initiative, concentrative ability, and acuteness of perception, as well as their huge unwieldy mass.

The legislative and political condition of a nation depends upon the balancing of its law-making groups, and usually resolves itself into a contest between the three groups above enumerated. When one weakens, or two combine against a third, the result is an economic change. But though typical this operation is not invariable. There are many small groups which at times become factors, and, attaching themselves to a larger group, produce a change in equilibrium. Then, again, internal action in the larger groups must be considered. Thus the subject group in the United State sometimes splits into native and foreign, the middle class into employers and employees, and these divisions temporarily attach themselves to different allies, with consequent overturnings of political parties and policies.

W. M. BLATT

But the phenomenon which concerns us here is the one that has taken place in the master class. In other countries it consists of a strong nobility, or landed gentry, or royal family, sometimes overpowering, but almost always equal to, the great financial heads who form the rest of the major group, and with whom they usually work in harmony on national issues. But this harmony is in itself a result of balancing, the nobility or gentry or king insisting upon a certain amount of concession to the public welfare as the price of their co-operation. This concession is insisted upon, not so much on account of a disinterested love of justice on the part of the aristocrats (although there are many individuals among them who are so actuated), but because the nation as a unit holds them to a personal accountability in the exercise of their public or quasi-public powers, and they can be easily detected and punished for any breach of the trust. The financial leaders are anxious to conciliate the aristocratic element for various reasons, but principally because by antagonizing them they would be handicapped, and lose more than they have to concede by uniting with them. Consequently these two groups work together so often and so naturally that normally they may be regarded as a single group. In the United States the "master" group presents a curious condition. We have here no king, no distinct nobility, no real landed gentry in the sense of a type devoted to the interests of proprietors of real estate recognized as such by the people as a whole, and held as a group to the responsibilities of landowners. On the other hand, we have here an indigenous type, the political boss, who in some respects takes the place of the king, nobles, and hereditary aristocracy. The political boss has some of the social power, much of the personal influence, of the elements for which he is the substitute, but the nation does not hold him up to the high personal probity, the duty of self-sacrifice, which king and noble and squire are expected to sustain. His economic function is at core very different. He is bound primarily to provide spoils for his party, secondarily to govern the country so that the

spoliation shall not be oppressive enough to cause a dangerous revolt.

It now becomes apparent that the financier in America lacks a check which in every other country he must contend with,—the aristocrat. In dispensing with the aristocrat we have rid ourselves, to be sure, of a powerful selfish factor, but we have lost an equally powerful check on other selfish factors. Be it understood that this aristocratic element had its good and bad checks on all the other classes, but we are now concerned only with its result on the financiers and great merchants. For them the change meant very much, and, released from their bonds, they have gone further in this country than in any other civilized land. They have appropriated sovereign powers in the control of railroads, telegraphs, and telephones; they have acquired the ability to regulate the currency; they have obtained monopolies of many commodities; they have shifted the burden of taxation so that they bear a ridiculously small part in proportion to their holdings; they have secured a tremendous influence over legislation; they have defied the courts and flouted the criminal laws.

But they are not to be deemed, for all this, a peculiarly selfish or unscrupulous class. The other leading groups have in the course of history given proof that they are capable of like rapacity. The middle class has shown a more equitable tendency, and the subject class can be led into more unprofitable sacrifices, but selfishness pervades all ranks, and is seldom undiscernible. Each class in proportion to the weakness of its opposition inevitably exercises its peculiar form of tyranny. The subject class, turned loose, descends to acts of arbitrary vandalism; the aristocrats, left without sufficient checks, are led by coldness and lack of sympathy into nonchalant cruelty or deliberate oppression of their social inferiors; even the middle class, unrestrained, become narrow and intolerant, forcing their tastes, beliefs, and habits upon those whom they happen to dominate, and meeting refusal with punishment of one kind or another.

The present purpose, however, precludes a development of this larger theme, and it is introduced only by way of preparation for what we may expect to find happened in America when the capitalists and political bosses, constituting the master class, worked out their ends unhampered by a nobility or aristocracy.

Their general tendencies have been noted above. In concrete application of their methods the capitalists gradually used their influence until it was evident that certain newspapers could be relied on to treat as fetishes beyond the pale of criticism the Constitution of the United States, the judiciary, and the established order of government. All inquiries into these things, all suggestions that they were not working as well as they might, were met by outbursts of indignation, of vilification, of characterizations implying that the inquirer was a traitor, a demagogue, an incendiary, a secret enemy of law and order, a libertine, a degenerate, and a madman waiting for an opportunity to use the torch and bludgeon. All these terms have been applied to many a mild philosopher who was no more than ten or twenty years ahead of his times. The other opinion-making sources were similarly afflicted. Possibly by sinister methods in some cases, but usually by mere social pressure, the clergy, the school teachers and the bench were "reached." Employees found that they lost their places if they displayed too much originality in their political views. Debtors found that creditors were unwilling to trust them if they expressed doubts about the sacredness, yes, *sacredness*, of the Constitution, or the courts or the inspiration of the founders of the Republic. No man, unless he defied social and commercial ostracism, dared ally himself with any school of thought looking to an important change of any kind in the machinery of government. Socialist, nationalist, single-taxer, were associated with violence of the worst sort, judged by their most irresponsible adherents, and held up to the horror and contempt of the community. Why?

Because the capitalists and bosses had gained control of the government, and were building up a set of monopolies in

highways, public utilities, and commodities, and naturally used every means in their power to prevent any change in the very satisfactory conditions. The confusion of events and circumstances which accompanies the development of a new country made it possible for the pioneer capitalists to start, without attracting attention, the practices which were to make them so powerful. The hysterical generalizations of the French-influenced revolutionists made it easy to crush, as intolerable restraints on the civil freedom of man, those legislative safeguards which in a more sedate community would have nipped the growth of monopoly; and, perhaps more than all else, the great natural wealth of the Western Continent made the encroachments of commercial freebooters and their enormous acquisitions so little of a burden that for a long time popular indignation was not aroused.

There were other reasons for the delay. One a universal law, the other a special condition.

The universal law is that of inertia. The larger the mass the more difficult it is to move it and the slower the process. This is, humanly stated, the law of popular conservatism. It explains why it is so hard for the bulk of the people to be rooted out of their habits, whether religious, political, or social, and why, once started, it is so difficult to make them come to rest again at the proper point. In other words, it explains why revolutions are so slow in coming and so excessive when they come. It also explains why the United States of America, a pure republic, unhampered by established castes or millennium-old intrenchments of reactionary classes, should yet be one of the slowest nations in the world to adopt political reforms, modern conceptions of government, or the European spirit of democracy. For all reforms come from the middle class, and in America the middle class is enormously large as compared to its proportionate size in other countries. Its tremendous bulk cannot be budged quickly or easily, and thus, in spite of its own conviction that it leads the world in republican administration, it really lags behind in all political innovations, in legal procedure, in government ownership of natural monopolies, in government philanthropies, and, in short, in the entire catalogue of social development.

Carefully fostered by the money power, this provincialism grew until innovation became a bugaboo. And although, as one philosopher has pointed out, a nation which develops a kind of type in abundance is sure to develop another type exactly opposite in kind, though usually much smaller in numbers, yet in America the lot of the innovator has always been particularly hard; intolerance of strange customs, beliefs, and appearances has been most marked, and ancient objects still receive a peculiar reverence.

As a disease creates its own toxine, an anomalous social condition at last produces enough of the protesting type to constitute a movement. Such a movement has begun in the United States. How it commenced is not yet clear, but probably several causes contributed. First, the middle class increased its luxuries, and as a whole grew to living beyond its resources; the financiers increased the cost of commodities, and the middle and lower cases, driven to the wall by the protective tariff, the monopolistic trusts, the filling up of the finer farming regions of the middle and far West, began to feel the pinch of poverty. Looking about, they realized that this country was famous for its millionaires, its monopolies, and its provincialism. Foreigners insisted that European governments were not soul-less aristocracies; that American politicians grafted from the people far more than Continental monarchies with all their large armies; that justice was far more efficient in Germany, France, Italy, than in the land where it should theoretically be most triumphant; and that, considering the wonderful resources of this continent, the average citizen was having a strangely hard time to get along or provide for his old age.

A great deal of this impression was based on false premises, to be sure. Americans had grown extravagant; improvidence and laziness accounted for a good share of dissatisfaction; yet there

was a residuum of men who were willing to work hard and live sparingly who could not earn enough to risk the prospective expenses of married life, or lay aside a fund for their retirement, or to give their children a start in the world, as they learned most Europeans, even of the peasant class, were able to do. Then a group of writers inaugurated a set of disclosures showing, or claiming to show, that many of the largest fortunes had been built upon fraud and dishonesty, and that many of the most powerful officeholders were in secret league with great corporations. Such charges had been made before, but never with such definiteness and thoroughness. They caught the popular favor, and a conviction spread upward from the ranks of the irresponsible into the conservative middle class, that there was something unhealthy about our political and economic conditions, and that unless the great financial groups and units were curbed, they would grow beyond the control of popular will. It is this idea of the control of huge fortunes, the singling out of separate trusts for restraint, that constitutes the new American principle. It involves a new way of thinking, a complete contradiction not only of the letter, but of the spirit, which actuated many of the American revolutionists, and, loath as the people have been in the past to question the wisdom of these pioneers, they are ready now to revise many of the propositions on which the government of the past was, or was supposed to be, grounded. Now one of the most comfortable Gallicisms in the utterances of the founders of the American Union was that all men are born free and equal; it was the transfiguration, the glorification of the English principle of equality before the law. This clause became the shibboleth of the new Republic, and flowered in various enactments, especially in the "due process of law" clause which has been so much discussed of late. But

Photo by Boston Photo News Co.

A SECTION OF THE WORLD'S LARGEST AQUEDUCT

Which supplies water to the city of Los Angeles. It will irrigate thousands of acres of orange and lemon groves and will supply power to light the city's streets and for its business enterprises. This great pipe line, carrying water from and under mountains and over a desert, is 235 miles long and cost $26,000,000.

no one saw at first, and many do not now see, that the idea of equality before the law is a fallacy, a deflection of the truth; the real principle of justice being not that all men should be held to the same degree of responsibility and accountability, but that the standard of integrity should *increase,* and not *decrease,* in proportion to the power, wealth, and fiduciary importance of the litigant. A lawyer, a judge, or a trustee should be held to a higher degree of honor than a co-contractor in an ordinary matter. A railway, a telephone company, or an insurance corporation owes a more exacting duty to the public than does a workman or a petty storekeeper.

A small expressman is guilty of no moral turpitude if he gives his larger customers a specially low rate; but a great common carrier cannot be permitted to make exceptions. A petty dealer can refuse to sell to a man whom he dislikes, but a gas company must supply any citizen who is willing to pay; a local merchant may exact any price that his neighbors can be made to pay for his wares; but a great oil company, even though not a monopoly, will earn the ill will of the community to a dangerous degree if it makes an exorbitant profit. A retail dealer may make his alderman a present for procuring a permit to have a sidewalk display; but the employment of lobbyists to further special legislation for great corporations or capitalists is corrupt. And, finally, we have read that one of the officers of a great industry admits that the prices charged by his corporation and other important aggregated commercial groups ought to be regulated by legislation so that they shall not become extortionate or dishonest. This new principle of equality is already in force. It is unnecessary to tabulate all the developments of the idea. New ones crop up every day. The regulation of freight rates, the suppression of rebates, the war on lobbies, are only a few of its activities. Nor is there anything sudden or revolutionary about it. The development of the movement can be traced step by step through party platforms, acts of Congress, and judicial decisions, as well as through the enormous mass of popular literature.

The elaboration of the theory of "police power," by which the courts have insisted, contrary to the whole trend of the common law, that the government may, almost arbitrarily, regulate by confiscation property which is used inconsistently with the public welfare smacks strongly of the reaction against "equality before the law." The Standard Oil decision anent "reasonable" trusts, and those leading up to it, undoubtedly show the drift towards a jurisprudence that distinguishes between persons according to their control of the market.

Viewed in this light, such decisions are not entirely the surrenders to capital which many critics have declared them to be. On the contrary, they contain the germ of the new jurisprudence, the new justice, the principle that all men should be honest in the sense of the decalogue, but that great powers, financial, social, and political, owe certain higher duties in proportion to their strength, duties which the genius of American government has determined to enforce.

The issue has not yet been clearly put. When it does come fairly for decision, it is to be expected that selfish interests and the reactionary tendencies of the older generation will meet it with a determined opposition; but the great mass of the citizens is started out of its rest inertia, and has passed into the motion inertia stage, and the opposition of any other group will be swept away easily and completely, as everything has always, in all historic time, been swept away before this most irresistible of human forces.

William M. Blatt

The Case of Flintby vs. Paxton

BY ASHER L. CORNELIUS

Of the Detroit (Michigan) Bar

OHN PAXTON was aroused from his bed early one Saturday morning by a peremptory knock at the door by someone who, from the manner of making his presence known, would brook no delay.

Hurriedly drawing on his trousers, John appeared at the door, and was met by the county sheriff, who handed him a summons, and after making a gruff comment or two about the weather, drove rapidly away. John took the summons mechanically, and looked it over The title of the case appeared to be "James K. Flintby vs. John Paxton, In the Circuit Court for Marion County." The summons read, "An action in ejectment and to quiet title to a certain lot No. 45."

"What in the world can this mean?" said John to his faded, wistful-looking little wife, as he showed her the summons. "We haven't had any quarrel with anybody, and the only property we have is the lot where we are now building our house, and I have got a warranty deed for that from old Willis Lareau. Why should anybody sue me?" "Lot 45," mused John, "Why, I guess that's the lot I am building on. Is it possible someone is trying to take that lot away from me?"

John Paxton was a hard-working mechanic who had labored early and late during the better part of his fifty years of life, with the one idea before him of accumulating sufficient means to secure a home. His wages were small and his family large, and both he and his wife had worked incessantly, trying to provide for a family of five and at the same time save sufficient means, first, to purchase a lot, and afterward to construct a residence. It had required all their surplus savings for more than seven years to get together sufficient means to buy a lot, their first step in the effort to realize their ideal; it had taken them almost twenty years to accumulate $2,000, which, with the aid of a construction loan of $1,500, would be sufficient to realize the ideal which John and his wife had always kept before them. Indeed, matters had progressed so far that the lot had been purchased and paid for and the building completed, all except the interior finish.

While John Paxton and his wife had a severe struggle to make ends meet, there was one thing which, in spite of their poverty, they had not neglected, and that was to keep their daughter Edith in school until she had not only graduated from the local high school, but had completed a course in music as well, and now Edith, who had just turned twenty-one, was beginning to be self-supporting, and John and his good wife had just reason to be proud of her.

"I would go right away to a lawyer and see about this matter, John," said Mrs. Paxton, as soon as her husband had shown her the summons, "I would lay off to-day and look after this matter right away." John put on his coat and hat and started down town. He knew a young lawyer by the name of Henry Fitzgibbons, who had recently been elected prosecuting attorney of the county. Indeed, Henry had called on Edith at the Paxton residence on several occasions, and had shown a great deal more interest in Edith than she had displayed towards him.

John handed the lawyer the summons. He read it carefully, and then whistled softly. "James K. Flintby apparently wants your property, now, John, since you have your residence almost completed. He wants to eject you and to quiet title, it seems. It also seems that he is willing to spend a pretty good bunch of money to get this accomplished, as he has employed one of the best law firms in this section of the state, Daggett,

Smith, and Daggett, his lawyers, have a reputation for going through with almost anything they start," continued Henry. "However, I cannot tell you much about it until I go over and get the bill of complaint, and then I can see just where we are at." The lawyer hurried to the clerk's office and secured a copy of the complaint. From that, his worst fears were realized. The complaint alleged, in brief, that the complainant had, some three years ago, obtained a judgment against Willis Lareau, the party from whom John Paxton had bought the property; that Flintby had caused to issue against the property of Willis Lareau an execution. The complaint further averred that Flintby had looked up the records and found the title to lot 45 appeared of record to be in Willis Lareau at the date of issuing the execution; that thereupon the sheriff had levied on said lot 45 and sold same at public auction, and that said lot had been bid in by complainant. More than one year had elapsed and the defendant, Willis Lareau, had not redeemed said property, and the complainant had received a sheriff's deed, and had recorded it in the records of Marion county. Complainant further averred that the defendant, John Paxton, was attempting to build a house on said property, was claiming it as his own, and asked that he be restrained from so doing, and that he be ejected therefrom.

"See here, John," said the lawyer, "have you a deed for that property?"

"Yes," said John promptly, "a warranty deed. I got it from old Willis Lareau, and have owned it nearly nineteen years."

Fitzgibbons looked at the deed carefully and then said: "Why, John, you have never had this instrument recorded, and so far as the record title shows, at the time old Flintby issued his execution the property stood in the name of Willis Lareau. It has therefore been sold and bid in by Flintby and now he has the record title. Didn't you know, John, that a deed unrecorded was of no value against an innocent purchaser from one who had the record title?" "I didn't know much about law," said John, "I supposed that when a fellow got a warranty deed, that gave him a good title. No one ever told me to record the deed, and here I've gone ahead and put every nickel I have ever saved into building a house on that property. Do you mean to tell me that the law will permit anybody to sell this property right out from under me?"

"Well, all I can say now, John, is this, that the thing looks mighty black for you. I haven't looked up the law, yet, but from what I know now, I don't just see anyway of saving your property."

"My God, man," said Paxton, his face drawn and white, "do you know I have worked a lifetime to accumulate money sufficient to buy that property? It is all I have, and even on that I am in debt nearly $1,500, and I am too old to save and get another one. Do you mean to say that any court will take that property away from me just because I didn't record my deed?"

"It doesn't look right, John," said the lawyer, "but law is law, and for the life of me, I don't see any way just now whereby I can save it, but if there is any way we can do it, you can bet your life I'll turn heaven and earth to beat old Flintby out on this rotten deal. Flintby is the worst old miser in this county, John. He makes a business of buying up tax titles and buying at execution sales, and anyway he possibly can work it to get something for nothing. I am just as well satisfied as I am that I am living that Flintby knew you owned that property, but the question is, our evidence is not in such shape that it will avail us in this connection. Leave it to me, John, and I will see what I can do."

John Paxton went home that night a broken man. By a trick of the law and the connivance of a cunning old miser, he saw the savings of a lifetime slipping away. His hope of securing a home for his declining years was completely shattered. Visions of his last days to be spent in the poorhouse, and as a pauper, pressed in upon him. When he reached home, he threw himself on the bed so utterly depressed that he could scarcely speak. John's wife, knowing that her husband's depression could presage nothing but unfavorable tidings, retired

to the kitchen and spent the evening crying and alternately bracing herself and endeavoring to rally to the conviction that somehow or other the brilliant young lawyer in whom both she and her husband had great confidence would save them from the calamity that seemed unavoidable. Edith was not at home that evening, but the younger children, awed by the grief of their parents, sat huddled in a group by themselves and talking only in whispers, until finally they crept off to bed. After John had left Fitzgibbons, the lawyer sat for some time earnestly reflecting on the facts of this case. Flintby's position, upon a casual review, seemed to be impregnable from a legal standpoint, and yet, Henry said to himself over and over again, "there must be some way to defeat this iniquitous action."

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Henry's interest was unusually keen in this case, partly because he saw at a glance that this was one of the most unjust cases ever filed in any court, and still a stronger reason, which was Edith. Henry had met Edith on several occasions, and had secured her consent to call at the Paxton home, but for some reason or other, Edith did not show very much interest in the young man. Edith was the sort of a girl, however, that would interest any man. She was tall, slender, with honest, brown eyes, and an unusual freshness of personality that impressed everyone who met her. From the moment that he met Edith, Henry had taken in her a far more than passing interest. He noted that she was absolutely devoid of deceit, and had seemingly a broad sympathy for everyone, both rich and poor, extending even to pets and animals, and somehow or other Henry had compared her over and over again in his mind with his ideal of the girl he wanted for his wife, and could not, for the life of him, find where Edith did not fully measure up to this standard. For more than ten days prior to the trial of the case of Flintby v. Paxton, in the circuit court, night after night, a light might have been seen in Henry Fitzgibbon's office, for the lawyer was poring over books and comparing decisions in his endeavor to defeat the greedy plans of Flintby. There was no branch of the law pertaining to ejectment and quieting title that Henry did not read, and there was no decision which had even a remote bearing upon that case with which he was not entirely familiar. On the morning of the trial, Mr. Daggett, senior member of the firm of Daggett, Smith & Daggett, appeared in court, smiling and confident. Flintby was there, too, with his greedy and avaricious face lighted up with a look of satisfaction that indicated that he felt absolutely no doubt as to the outcome of the action. John Paxton and his wife were also present, looking very much worried and anxious. Edith had attended the trial with them, and was watching the whole proceeding with intense interest.

The crier called the case, and the trial was opened by Mr. Daggett, who placed the complainant, Flintby, on the stand. Complainant testified, in brief, that he had sued Willis Lareau, and had se-

cured a judgment against him; that thereafter, desiring to satisfy said judgment, he had gone to the records and had looked them over, and had discovered the lot in question stood in the name of Lareau; that he then went up and looked at the lot and saw it was a valuable one, and had the sheriff levy on it, and that he then bid it in at the sheriff's sale; that he, Flintby, had been the owner of said lot for more than two years by reason of the deed secured at such sheriff's sale.

Everything seemed to be going on smoothly for Flintby, and at the conclusion of his testimony, when the complainant rested, the loungers about the court room freely predicted he had made an unassailable case. At the conclusion of a short recess, the witness was turned over to Fitzgibbons for cross-examination. Henry's cross-examination was very brief, and in the following language:

Did I understand you to say, Mr. Flintby, that you inspected this lot before you bid it in?

A. Yes, I looked it over thoroughly.

Q. Did you notice any sign on this property?

A. Yes, I saw a sign on the property.

Q. And what reading matter, if any, did this sign have upon it?

A. Well, if I remember rightly, the sign had on it, "For Sale. Inquire of John Paxton, Owner."

Q. Did you make any further inquiries about the title to this property, that is, who owned it?

A. No, sir. I simply relied on the record.

"We have no further cross-examination, your Honor," said the lawyer.

The testimony of the defendant was very brief. John Paxton took the stand, and briefly testified that he had purchased the property and received a warranty deed for the same from Willis Lareau nearly twenty years ago, but because of ignorance of the law, and not knowing it was necessary, he had failed to record his deed; and the defense then rested.

At the conclusion of the testimony, the court said: "Do you desire to argue this case, gentlemen?"

"Your Honor, I do not believe any argument is necessary," said Attorney Daggett, confidently. "The facts are not in dispute. It is purely a proposition of law. The proceedings appear to be regular. Complainant bought and purchased this property according to the requirements of the law, and therefore the court should decide for the complainant."

"Do you desire to be heard?" said the court to Henry.

"I certainly do, your Honor," said Fitzgibbons, "we rely on the broad principle that a sign placed upon vacant property, which sign designates who the real owner is, is sufficient to put any purchaser at execution sale on his guard. If such purchaser had notice, it was his duty to make further inquiry and ascertain who the real owner of the property was. By the undisputed testimony in this case, of Mr. Flintby himself, complainant looked at this property and saw the sign placed thereon, and saw that that sign had printed upon it, 'For Sale. Inquire of John Paxton, Owner.' Therefore it cannot be said that the complainant in this case was an innocent purchaser of this property, and without any question, without even the necessity for further argument, the court should find for the defendant. The case is clearly controlled by Walker v. Cady, 106 Mich. 21, 63 N. W. 1005, which holds that one who buys property after receiving notice of a claim of ownership in a third person is not a bona fide purchaser. It is also said in Hicks v. American Natural Gas Co. 207 Pa. 570, 65 L.R.A. 209, that it is the duty of one contemplating the purchase of a farm to make inquiry as to the purpose of a derrick and connecting machinery, which are plainly in use for the production of oil or gas on the premises, and that his failure to do so deprives him of the character of an innocent purchaser, who had paid the purchase money without notice of any prior grant."

"Will you kindly hand up those decisions for the court's inspection," said the judge.

The court, after reading the decision, said: "I am convinced, Mr. Daggett, that I should find for the defendant in this case, as the authorities cited by him seem conclusive. Unless you know of author-

ity to the contrary, I shall have to hold your client was charged with notice of Mr. Paxton's title, and find that your bill is without equity and against the complainant."

Mr. Daggett was unable to cite the court any decision, and after waiting a moment or two, the court said to the clerk, "You may please enter, Mr. Clerk, on the records of this court, a decision against the complainant. Mr. Bailiff, adjourn court."

And thereupon something happened. The entire Paxton family made a vigorous rush towards Fitzgibbons. John Paxton pumping one hand vigorously, Mrs. Paxton shaking the other tremulously, and Edith Paxton standing directly in front of Henry with a look in her eyes that made him the happiest lawyer in Marion county.

And after congratulations had been passed, John Paxton and his wife walked home, which was only a short distance from the outskirts of the town, and Edith and Henry followed, and that evening, while sitting in a rustic seat under the maples in the yard, John Paxton called the lawyer in and said, "Well, Mr. Fitzgibbons, I should like to know what your bill will be for handling this case. That matter has been worrying me some little, because I have put all the ready money I could secure into the home I am building, but whatever your bill may be, I can pay you a certain amount monthly until I finally get it all paid. You certainly did a wonderfully fine job, and whatever your bill may be, I am not going to make any kick on it."

"Well," said Henry, thoughtfully, "I am going to place a very heavy price on my services, and I am going to do something I don't usually do, and that is to demand my compensation without delay."

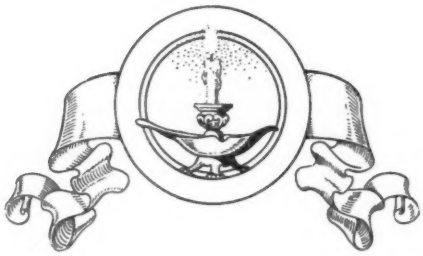
"But I can't pay you now, Henry," said Paxton.

"Yes, you can," said the lawyer, "the price I now demand is your daughter for my wife. That is the only way you can discharge my bill."

"That is a heavy price, my son," said Paxton, "but take her, and God bless you, provided, of course that Edith is willing."

And the happy, smiling face of Edith, as she came through the door, assured him that she was.

Gaher L. Cornelius



Editorial Comment

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Inadequate Equipment of Telegraph or Telephone Companies

THE analogy between the principle which determines the duties and responsibilities of telephone and telegraph companies and those which apply to common carriers of goods and persons is so strong that it is often said of them that they are "common carriers of news." The description is more applicable to telegraph companies than to telephone companies, for the one receives and sends a message, the other merely supplies the facilities by which the user may extend the compass of his own voice. Nevertheless, both telephone and telegraph companies are engaged in a quasi-public service, and are endowed with some of the sovereign powers of the state. Therefore, while it is not the purpose of this article to go into the question of discrimination, it may be said to be well settled that, without regard to statute, both kinds of companies must serve the public without partiality or discrimination.

Telephone companies, like similar quasi-public corporations, are under a general common-law obligation to supply reasonably adequate facilities for the service which they hold themselves out to do. This obligation, in a proper proceeding, may be enforced by compelling an enlargement of the plant, or by an action for damages due to disregard of this duty. There is a case, however, holding that a penal act requiring telephone companies to furnish facilities without discrimination cannot be said to require a company to depart from its usual custom in serving patrons, and increase its cables for an applicant whose application could not be immediately complied with because the company's cable running to his district was full. Cumberland Teleph. & Teleg. Co. v. Kelly, 87 C. C. A. 268, 160 Fed. 316, 15 Ann. Cas. 1210.

Recently, in order to comply with the standard of telephone service rules, the Wisconsin Railroad Commission ordered a telephone company rendering inadequate service to employ such additional help as would enable it to make sufficient and regular service tests and inspection of its lines and apparatus, and to enable it promptly to investigate and remove all causes of complaint; also to maintain between two points a through line along which few, if any, subscribers' instruments were installed, and to so establish a public toll station at a point on a through line that it would be convenient for local and transient toll patrons. Grantman v. Theresa U. Teleph. Co. P. U. R. 1915A, 103.

There is authority for stating that at

a small station it is not the duty of a telegraph company to keep more than one operator, and that if a message is left with a messenger during the operator's absence, and the message is forwarded on the operator's return, after a reasonable absence, the company is not guilty of negligence. Behm v. Western U. Teleg. Co. 8 Biss. 131, Fed. Cas. No. 1,234.

Relying on the Behm Case, above cited, an attempt was made in the trial court to excuse a telegraph company from liability for nondelivery of a message, on the ground that the business and emoluments of the office at a certain place were insufficient to justify the employment of a separate telegraphic operator, or a messenger boy to deliver the message. The court, however, in Western U. Teleg. Co. v. Henderson, 89 Ala. 510, 18 Am. St. Rep. 148, 7 So. 419, refusing to follow the Behm Case, stated that while this might furnish a very good reason for withholding telegraphic service, or perhaps for different regulations in regard to delivery at places thus circumstanced, it afforded no excuse for violating the terms of a contract.

So, it has been held that where the agent of a telegraph company received a message for transmission, and accepted pay for the same, the fact that the company had no office or agent at the place where it was to be sent was no excuse for failure to transmit and deliver. Western U. Teleg. Co. v. Jones, 69 Miss. 658, 30 Am. St. Rep. 579, 13 So. 471.

Upon an appeal by a telegraph company from a ruling of the board of railroad commissioners subjecting it to the penalty for violating the prescribed rates for transmission of telegraph messages, the court in Leavell v. Western U. Teleg. Co. 116 N. C. 211, 47 Am. St. Rep. 798, 21 S. E. 391, 27 L.R.A. 843, stated that it was the duty of the telegraph company to have sufficient facilities to transact all the business offered to it for all points at which it had offices. If the press of business offered was so great that one wire or one operator at a point was not sufficient, it was the duty of the company to add another wire or an additional employee. It was not a mere private business, but a public duty, which the company by its franchise was authorized to discharge.

In an action brought to recover damages for alleged wrongful refusal to furnish plaintiff with telephone service, it was held in Gwynn v. Citizens' Teleph. Co. 69 S. C. 434, 104 Am. St. Rep. 819, 48 S. E. 460, 67 L.R.A. 111, that the fact that a telephone company had not the means to supply service to one applying for it could be shown in mitigation of damages for refusal to comply with its duty in that regard, but not in justification thereof.—John D. Chamberlain.

An Attempt to Change Copyright Laws

MANY inquiries have been received by the Selig Polyscope Company, asking if one can copyright a motion picture play manuscript. A writer cannot copyright a motion picture play manuscript as such. The production can be copyrighted after it is filmed, but the writer of an original plot cannot send a copy of that picture play plot to Washington, and obtain copyright protection thereon. Attorney Frank B. Willis, recently elected governor of Ohio, introduced a measure in Congress a year ago, asking for copyright protection to motion picture play plots, classifying them as "dramatic compositions." Up to date, this bill has been buried in the patents committee, and has never seen the light of day. The Photoplay Authors League of California, it is said, has engaged legal talent in an endeavor to force out the bill and obtain action thereon.

Whether this attempt will be successful remains to be seen. Legitimate motion picture manufacturers will not filch the plots submitted to them by authors, and the agitation for copyright protection develops from the fact that some few obscure or "wild cat" companies have appropriated ideas found in submitted manuscripts.

The Mortgage in Motion Pictures

THAT good old standby of the spoken drama of the thrills classification, namely the mortgage and the shyster lawyer, are barred from picture play plots purchased by the leading manufac-

turers. In speaking of the ban placed on the mortgage plot, the Selig Polyscope Company Editor recently said:

"The mortgage plot was thought to have died a natural death in melodrama when 'the papers' were worked overtime by the villain. But not so. With the advent of the motion picture play, all the time-worn tricks of the spoken drama were lugged to the animated screen, and presented to the people as 'new stuff.' There was always the unjust travesty on the legal profession, the 'shyster' lawyer, who held the mortgage on the old home farm, and who threatened to foreclose the same unless the farmer's beautiful daughter, in love with the honest young husbandman on the adjoining 'forty,' was given to the lawyer in marriage. The 'shyster' lawyer, so called, always appeared in an office in which there was a small safe in one corner, and he invariably visited the safe, produced the 'papers,' and then rubbed his hands in fiendish satisfaction. Of course he met a timely punishment, but in so doing the members of the legal profession were frequently presented in an unfavorable light. The Selig Company will not buy plots of this nature, and other concerns are following suit."

It is gratifying that an enterprise exerting such great influence upon modern thought as the motion picture industry is unwilling to travesty the legal profession, but seeks rather to accord it due respect as an ancient and established institution and a conservator of human rights.

Far Eastern American Bar Association

THE Far Eastern American Bar Association, designed to bring into co-operation American lawyers not only in China and Japan, but the Philippines as well, was formally organized at a meeting held in the sessions room of the United States Court for China, on December 7th.

Mr. Fessenden, acting chairman, stated that drafts of the proposed constitution had been sent out and had been signed by all resident members of the American bar in Shanghai except two.

The constitution specifies as the objects of the organization—

"The better to maintain the dignity, honor and interest of the American legal profession in the Far East, to promote and improve the *morale*, efficiency, and solidarity of its members, to enable them to keep in touch with the progress of juridical science and its promoters throughout the world, and especially in America, to assist in the due administration of justice the courts in which they practice, and to secure the general observance of the American Bar Association's Canons of Legal Ethics, which are hereby declared part of the rules of this Association."

Active membership is open to "any American citizen residing in the Far East who has been regularly admitted to practice in the Federal Supreme Court, the United States Court for China, or the highest court of any American state, territory, or possession."

Judge C. S. Lobingier was chosen as the first President of the Association. Mr. E. P. Allen, of Tientsin, and Mr. A. P. Bassett, of Shanghai, were elected vice presidents and Mr. E. B. Rose secretary and treasurer.

Professional Ethics

THE Committee on Professional Ethics, of the New York County Lawyers Association, has answered recently several questions as follows:

Question: W., an attorney, obtains a judgment for his client J. in the sum of $150. After taking an inquest, and obtaining an order for the examination of N., the judgment debtor in supplementary proceedings, W. is approached by C., the attorney for N., and is offered the sum of $10 as his own fee in this matter, and $25 for J. in full settlement of all claims against N. W., after conferring with his client, decided not to accept this offer.

Subsequently C. approaches J. and offers him $10, which is accepted in full satisfaction of J's claim against N. This is done without consulting or informing W., the attorney for J.

Kindly advise me whether this conduct

on the part of C., an attorney, is professional and proper.

Answer: In the opinion of the Committee, the act of C. in approaching W.'s client and settling the proceedings without W.'s knowledge is unethical.

Canon 9 of the canons of the American Bar Association reads in part as follows: "A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with counsel."

Question: A young man intending to apply for admission to the Bar, but not yet having taken the examination, has a position as a law clerk in the office of a firm of attorneys. The young man and the firm wish his friends to know where he is, and that he holds an important position in the office, believing it to be possible that some legal business may follow him into the office. Under these circumstances, is it proper that the name of the young man should appear upon the office door, underneath and separated from the names of the firm and the partners, there being nothing on the door to indicate that the firm is a law firm or practising law? The young man's name does not appear upon the stationery.

Answer: In the opinion of the Committee, the placing of the young man's name upon the door under the specific conditions of the questions, and with the purpose indicated, would seem to be objectionable. It is not proper for members of the Bar even to aid in misrepresenting any occupant or employee in the office as being a member of the Bar.

Question: Friends of a law clerk not yet admitted to the Bar occasionally retain the attorneys in whose office the law clerk is employed, probably out of compliment to the law clerk. It is well understood that the firm cannot divide with the clerk any fees resulting from this business. The clerk receives a regular salary. Is it improper for the attorneys to recognize the quality of the services performed by the clerk in assisting the firm in transacting this business by making him additional compensation from time to time, not measured or graduated as a percentage of the fees of the business, but being more or less arbitrary in amount?

Answer: In the opinion of the Committee the practice mentioned in the question is improper. It violates the rule that a lawyer should not pay, by way of bonus or otherwise, to a person not an attorney at law, a consideration for bringing in business.

Question: Is it ethical for a lawyer who is an expert in the preparation of briefs to put a card in a legal journal announcing his preparedness to do special work of this kind?

Answer: In the opinion of the Committee there is no impropriety in a lawyer's offering his assistance as a brief-writer to other lawyers in the manner stated. But see Answers to Questions 36, 46, 58 and 65; and Number 27, Canons of Ethics of American Bar Association.

Question: Is it proper professional conduct for a lawyer who is counsel for a public administrator, and who has appeared in behalf of the public administrator to oppose the probate of a will, and has been permitted by the court as *amicus curiæ* to propound questions in opposition to the probate, notwithstanding the objection that his client has no standing to make such opposition, and who has by his questions and the answers thereto induced the probate judge to state that he will require further proof to satisfy him that the will should be admitted, and will call for the production upon an adjourned date of an earlier testamentary instrument described in the questions, then to seek out the person named as executor in the earlier testamentary instrument executed by the decedent, and induce him to offer the earlier instrument for probate, and to employ the lawyer as his counsel for the purpose, notwithstanding such executor has previously announced that he was satisfied of the genuineness and validity of the later instrument?

Answer: In the opinion of the Committee the attorney's conduct is improper as stirring up litigation for his own profit, and in view of the capacity in which the lawyer elicited the information it was improper for him to so use it for his own advantage.

Among the New Decisions

Let us consider the reason of the case. For nothing is law that is not reason.—2 Ld. Raym. 911

Appeal — abandonment — liability on bond. Upon abandonment of an appeal it is held in the Oregon case of Woodle v. Settlemyer, 141 Pac. 205, that no liability attaches upon a bond conditioned to pay all costs and disbursements, and satisfy any judgment that may be awarded against appellant in the appeal.

The cases on abandonment or dismissal of an appeal as a breach of the condition of an appeal bond are appended to the foregoing decision in L.R.A.1915A, 839.

Appeal — divorce — allowance of alimony. That appellate courts possess inherent power to allow alimony, suit money, and attorneys' fees pending an appeal, and may make such allowance as the circumstances warrant, is held in the New Mexico case of Taylor v. Taylor, 142 Pac. 1129, L.R.A.1915A, 1044.

Attorney — disbarment — misconduct in judicial capacity. That an attorney may be disbarred for misconduct in his capacity of probate judge with respect to the settlement of the estate of a deceased person in the court over which he presides is held in the Connecticut case of State v. Peck, 88 Conn. 447, 91 Atl. 274, which further holds that the charging by a probate judge of a fee for pretended services as an attorney to an estate before him for settlement, and his enforcing payment through deception, threat, and the exercise of his authority as presiding judge, are sufficient to disbar him as an attorney at law.

It is also laid down that where a probate judge is not required to be an attorney at law, he cannot defeat disbarment proceedings against him for misconduct in office, on the theory that it is in the nature of official impeachment, which should not be permitted through such procedure.

The cases on disbarment or suspension of an attorney for misconduct in an official capacity other than his attorneyship itself are appended to the foregoing decision in L.R.A.1915A, 663.

Bailment — exhibit in museum. The placing by a jeweler in a museum maintained without profit for the exhibition of curios and works of art, of an exhibit to aid in filling its space, and incidentally for the benefit it may be to his business, is held in the Washington case of Colburn v. Washington State Art Asso. 80 Wash. 662, 141 Pac. 1153, to be a bailment for mutual profit, and requires the bailee to exercise only ordinary diligence for its protection.

This case further holds that one placing an exhibit in a museum which refuses to permit him to put a lock on the case, and merely wires another case against the opening, assumes the risk of theft by leaving the exhibit there with knowledge of the method of protecting it.

The decisions on liability for loss of or injury to property upon exhibition

accompany the foregoing case in L.R.A. 1915A, 594.

Bank — credit on overdraft — funds misapplied by warehouseman. A bank, it is held in the South Dakota case of Shotwell v. Sioux Falls Sav. Bank, 147 N. W. 288, annotated in L.R.A. 1915A, 715, cannot credit the proceeds of a draft against a bill of lading taken by a warehouseman in his own name for grain belonging to a customer, upon the overdrawn account of the warehouseman, so as to defeat the owner's right to an accounting, although it is entitled to credit for sums paid on the warehouseman's check without notice of the rights of the owner.

Bills and notes — settlement by joint maker — contribution. One of two makers of a promissory note, who gives his personal note to the payee upon the maturity of the note, and the same is accepted as payment of it, and it is thereupon surrendered and discharged, is held entitled in Larson v. Slette, 125 Minn. 267, 146 N. W. 1094, annotated in L.R.A. 1915A, 898, to maintain an action for contribution against his comaker.

Bills and notes — signature by officer of corporation — liability. The right of an agent who has signed a contract apparently as obligor to show that there was to be no delivery until words indicating a representative capacity had been added to his signature was considered for the first time in Toon v. McCaw, 74 Wash. 335, 133 Pac. 469, L.R.A.1915A, 590, which holds that one who places his name under the signature of a corporation to a note reading, "we promise to pay," cannot defeat liability to payee on the theory that the debt was that of the corporation, and that he signed as its officer, with directions that it should not be delivered until his title was affixed to his signature, if the direction was not complied with.

Bonds — municipal — estoppel to deny validity. If the laws are such that there might, under any state of facts or circumstances, be lawful power in a municipality or quasi municipality to issue its bonds, it is held in Aurora v. Gates, 125 C. C. A. 329, 208 Fed. 101, annotated in L.R.A.1915A, 910, that it may, by recitals therein, estop itself from denying that those facts or circumstances existed, unless the Constitution or the act under which the bonds are issued prescribes some public record as the test of the existence of some of those facts or circumstances.

Bonds — ratification — payment of interest on other bonds. The payment of interest by a municipal corporation on bonds illegally issued, for which it received full consideration, is held in Weil, R. & Co. v. Newbern, 126 Tenn. 223, 148 S. W. 680, annotated in L.R.A. 1915A, 1009, not to ratify other bonds issued under authority of the same statute, but under another ordinance and for a different purpose, for which it received no consideration.

Broker — estoppel to deny commissions — completion of negotiations by owner. A property owner who directs a broker with authority to sell the property, to discontinue negotiations with a prospective customer, and himself enters into an option contract with such customer for the purchase of the property, is held estopped, in the Washington case of Duncan v. Parker, 142 Pac. 657, annotated in L.R.A. 1915A, 804, to contest the right of the broker to his commissions because the negotiations resulted in a mere option, and the broker did not furnish a customer ready, able, and willing to take the property on the terms under which he was authorized to effect the sale.

Carrier — starting and stopping of street car — proximate cause of injury. That a passenger entering a street car on crutches must be permitted to secure a seat before the car is started is held in Rice v. Puget Sound Traction Light & P. Co. 80 Wash. 47, 141 Pac. 191, accompanied by supplemental annotation in L.R.A.1915A, 797, which case further determines that the starting of a street car before a passenger on crutches reaches a seat, and not the

subsequent sudden stopping of the car to avoid injury to a pedestrian, is the proximate cause of the consequent throwing of the passenger to the floor to his injury.

Constitutional law — special privileges — requiring payment of discharged railroad employees. A statute imposing a penalty on railroad companies for failure to pay employees who are discharged or voluntarily leave their service, within a few hours thereafter, is held unconstitutional in the Indiana case of Cleveland, C. C. & St. L. R. Co. v. Schuler, 105 N. E. 567, L.R.A. 1915A, 884, as conferring special privileges on such employees.

Contract — action by stranger on promise in his favor. The holder of a note against a partnership, it is held in Sweeney v. Houston, 243 Pa. 542, 90 Atl. 347, L.R.A.1915A, 779, cannot maintain an action upon a promise by one who, as part of the consideration for a transfer to him of the interest of one of the partners in the concern, undertakes to pay all indebtedness or liability of his vendor on account of or arising from the partnership transaction.

Corporation — foreign — trust — revocation of license. Under a statute providing that every foreign corporation admitted to transact business in the state, that is guilty of entering into any pool, trust agreement, combination, or understanding in restraint of trade, within this state, shall thereafter be prohibited from continuing its business therein, it is held in State v. Creamery Package Mfg. Co. 115 Minn. 207, 132 N. W. 268, annotated in L.R.A.1915A, 892, the court has no discretion, after the corporation is found guilty in an action begun and conducted under said sections, to grant any other or different judgment than one prohibiting the corporation from continuing its business within the state.

Criminal law — setting car in motion — hand car. The words "railroad car" in a statute providing for the punishment of one who mischievously or maliciously sets in motion any railroad car are held in State v. Tardiff, 111 Me. 552, 90 Atl. 424, annotated in L.R.A.1915A, 817, to include a railroad hand car, although the same section of the statute provides the same penalty for breaking and entering a railroad car.

Estoppel — of municipal corporation to deny liability for sewer. A municipal corporation which has power to contract for the construction of sewers is held estopped in First Nat. Bank v. Emmetsburg, 157 Iowa, 555, 138 N. W. 451, annotated in L.R.A.1915A, 982, to deny its liability to pay for a sewer which it accepts and uses, although the procedure leading to the formation of the contract was not in all respects according to the requirements of statutes.

Evidence — admission — failure to contradict accusation. Failure of a man to contradict a statement of his wife, with whom he was imprisoned on a charge of murder, that he had forced her to take the whole responsibility when he knew that he had made her do the killing, is held not admissible against him as an admission, in the Mississippi case of Riley v. State, 65 So. 882, L.R.A. 1915A, 1041.

Evidence — medical expert — cause of accident. In an action to recover damages for personal injuries by being thrown from a street car, where defendant's denial of the accident is supported by evidence, a physician qualified as an expert is held not entitled in Castanie v. United R. Co. 249 Mo. 192, 155 S. W. 38, annotated in L.R.A.1915A, 1056, to state that plaintiff's condition is due to the injury which plaintiff claims to have received and which is described to him in a hypothetical question, since that is the question which the jury must determine.

Evidence — opinion — common knowledge — cause of death. As a general rule, expert evidence is not admissible for the purpose of proving that a wound was or was not self-inflicted; but, where a wound is of an extraordi-

nary nature, and is upon a portion of the body of which men have little or no knowledge, then expert evidence is held admissible in Miller v. State, 9 Okla. Crim. Rep. 255, 131 Pac. 717, annotated in L.R.A.1915A, 1088, for the purpose of showing that such wound was or was not self-inflicted.

Evidence — opinion — ultimate fact in case. In an action to hold a telephone company liable for destruction of a building by lightning, which is alleged to have followed its wires into the building because of the negligent manner of conducting them into it, where the defense is that the lightning struck the building directly, without following the wires, it is held in the Tennessee case of Cumberland Teleph. & Teleg. Co. v. Peacher Mill Co. 164 S. W. 1145, annotated in L.R.A.1915A, 1045, that a witness cannot give his opinion that the fire was probably caused by the lightning following the wires, since that is the ultimate fact for the jury to determine.

Evidence — other crimes — intent. Upon the question whether or not the fire on a yacht, for setting which, to prejudice the insurers, one is on trial, was set by him or was accidental, evidence that within a few months a fire had consumed another yacht and an automobile belonging to him, both of which were largely overinsured, under circumstances tending to show that he caused them, is held inadmissible in Fish v. United States, 215 Fed. 544, accompanied with supplemental annotation in L.R.A. 1915A, 809.

False imprisonment — militiaman — liability. A member of the militia in active service under call of the governor is held liable in damages in Franks v. Smith, 142 Ky. 232, 134 S. W. 484, annotated in L.R.A.1915A, 1141, although he acts under order of his superior officer in making an arrest without warrant of one peaceably traveling on a public highway, upon an unfounded charge of carrying concealed weapons.

Food — prohibition of yellow oleomargarin. The production of yellow oleomargarin by the use of established ingredients in natural conditions and colors, and compounded in the usual and ordinary way, without selection or manipulation of the ingredients with the thought, purpose, or intention of giving it that or any predetermined color, is held not prohibited in People v. Guiton, 210 N. Y. 1, 103 N. E. 773, by a statute prohibiting the manufacture of oleomargarin out of or from oils not produced from unadulterated milk or cream in imitation of natural butter, where the statutory definition of oleomargarin recognizes that it would be in the semblance of butter. Recent cases accompany the foregoing decision in L.R.A.1915A, 757, the earlier authorities having been presented in 14 L.R.A.(N.S.) 1062.

Fraud — representations as to foreign law. That false representations with respect to the law of another state may be the basis of an action for damages on the ground of fraud is held in Epp v. Hinton, 91 Kan. 513, 138 Pac. 576, annotated in L.R.A.1915A, 675.

Highway — rope as barrier — negligence — liability for injuries. A municipal corporation is held not negligent, in the Virginia case of Cook v. Danville, 82 S. E. 90, L.R.A.1915A, 1199, in stretching, according to custom, a rope across the street to close it while repairs are in progress, so as to be liable for injuries to one who comes into collision with it while riding a motorcycle along the street.

Injunction — against breach of contract — clean hands. That a baseball club which induces a player to break his contract, by which the right to his services is reserved to another club, and to enter into a contract to serve it and no other party for a term of years, will not be granted an injunction to prevent his violating the terms of his agreement by serving his former employer, since it does not come into court with clean hands, is held in Weeghman v. Killifer, 215 Fed. 289, L.R.A.1915A, 820. This seems to be a case of first impression.

Insurance — absence of fair dealing — liability of insurer. An insurer against employers' liability is held liable in Brassil v. Maryland Casualty Co. 210 N. Y. 235, 104 N. E. 622, L.R.A.1915A, 629, to reimburse the insured for the expenses of a successful appeal from a judgment against him because of failure to deal fairly under its contract, where it refused to permit a settlement for the amount of the insurance, undertook the defense of the action, and, when a much larger judgment was recovered, tendered the contract indemnity upon condition that the judgment should be satisfied by insured.

Insurance — canceling agent's debt for premium. That one who gives his notes in payment for an insurance premium cannot defeat recovery thereon by showing an agreement that they were executed merely for exhibition to the corporation and return to him, and that the premium was to be paid by cancelation of the agent's indebtedness to him, since the agent had no authority to make such agreement, is held in the Arkansas case of Briggs v. Collins, 167 S. W. 1114, annotated in L.R.A.1915A, 686.

Insurance — exemption — debts of beneficiary. That a statutory provision that the proceeds or avails of all life insurance shall be exempt from all liability for any debts does not extend to after-incurred debts of the beneficiary is held in Reiff v. Armour & Co. 79 Wash. 48, 139 Pac. 633, annotated in L.R.A.1915A, 1201.

Insurance — failure of agent to obey instructions — liability. That failure of an insurer to demand unconditionally a cancelation of a policy after the agent has neglected to comply with its demand to secure an increased premium or cancel the policy, until a loss occurs, will prevent its holding the agent liable for more than the additional premium demanded, is held in the Arkansas case of Phœnix Ins. Co. v. Banks, 169 S. W. 233, which is accompanied in L.R.A.1915A, 860, by supplemental annotation.

Insurance — surrender by beneficiary — effect. The joining by the beneficiary named in a life insurance policy in a surrender of the policy is held not to estop him, in the Iowa case of Hicks v. Northwestern Mut. L. Ins. Co. 147 N. W. 883, annotated in L.R.A. 1915A, 872, where the beneficiary is subject to change, from contesting the surrender because of insanity of the insured, since he has no interest in the policy with respect to which he can contract.

Intoxicating liquors — necessity of license to take orders. A wholesale liquor dealer duly licensed to do business in one town is held not required, in the Michigan case of People v. Perenchio, 148 N. W. 205, L.R.A.1915A, 901, to secure a license in another town to enable him to take orders there by personal solicitation, to be filled by delivery to a carrier at his place of business, and to collect the price for the liquors delivered at the residence of the purchasers.

Intoxicating liquor — saloon on alley — prohibition. An ordinance of a municipality making it unlawful to sell, furnish, or give away intoxicating liquors as a beverage in a room having its principal door or place of entrance on an alley or in a room not fronting upon a street is held in the Ohio case of Maple v. Hiser, 106 N. E. 37, L.R.A.1915A, 1129, to be a reasonable regulation, within the police power of a municipality delegated to it by the state, and violates no constitutional provision.

Jury — exclusion from service — return of wrong verdict. The first decision involving the power of the court to bar members of a jury from further jury duty because of their misconduct, or because of dissatisfaction with their verdict, is the Louisiana case of Teat v. Land, 66 So. 199, L.R.A.1915A, 563, which holds that citizens cannot be arbitrarily barred from jury duty because of popular demand due to their having returned a verdict of acquittal in a criminal case which was properly regarded as a miscarriage of justice.

Landlord and tenant — construction of lease — improvements. A provision in a lease of land for an amusement park, that at the expiration of the lease the landlord may repossess himself of the land, together with all the improvements of whatever kind and nature erected upon the land during the life of the lease, is held in the Alabama case of Walker v. Tillis, 66 So. 54, not to include amusement devices placed on the land as trade fixtures with no intention to incorporate them into or make them a part of the realty. The recent adjudications on this question accompany the foregoing decision in L.R.A.1915A, 654, the earlier authorities having been presented in 42 L.R.A.(N.S.) 546.

Life tenant — right to dividends from sale of corporate property. Dividends declared by a lumber company, stock in which is part of testator's estate, out of sales of timber on its property, are held in the Maryland case of Washington County Hospital Asso. v. Hagerstown Trust Co. 91 Atl. 787, L.R.A. 1915A, 738, to be within the operation of a will directing a trustee to collect the income and pay it to a life tenant.

Malicious prosecution — compromise — effect. To maintain an action for malicious prosecution, the plaintiff must prove that the prosecution has terminated in his favor. If the termination of a prosecution has been brought about by compromise of the parties, it is held in the Georgia case of Waters v. Winn, 82 S. E. 537, annotated in L.R.A.1915A, 601, that an action for malicious prosecution cannot be maintained.

Master and servant — liability for injury by automobile driven by stepson. The owner of an automobile is held not responsible, in the Oregon case of Smith v. Burns, 142 Pac. 352, L.R.A. 1915A, 1130, for injury caused by his stepson, who is not a member of his family, but who has taken the car without permission, for a purpose of his own, although on a few occasions express permission had been granted him to use it and he had at times driven the car for the owner and his family.

Negligence — dangerous premises — death of child — liability. A property owner who leaves an open well unprotected on his property, to which, to his knowledge, actual or constructive, children resort to play, is held liable in Cœur d'Alene Lumber Co. v. Thompson, 215 Fed. 8, L.R.A.1915A, 731, for the death of a child who falls into it and is drowned.

Negligence — driver of vehicle — imputation to passenger. Where the plaintiff and the negligent driver of a private conveyance were, at the time of plaintiff's injury resulting from a collision with defendant's train at a railroad crossing, engaged in a joint enterprise, the driver's negligence is held in the North Dakota case of Christopherson v. Minneapolis, St. P. & St. M. R. Co. 147 N. W. 791, to be imputable to the plaintiff, and that no recovery can be had.

Supplemental annotation accompanies the foregoing decision in L.R.A.1915A, 761.

Nuisance — powder magazine. That a powder magazine is a nuisance, regardless of the question of negligence in the manner of keeping it, as to all property and residents in such proximity to it that they are subject to danger from its explosion, is determined in the Missouri case of State ex rel. Hopkins v. Excelsior Powder Mfg. Co. 169 S. W. 267, which is accompanied in L.R.A. 1915A, 615, by a note in which the recent cases on the subject are presented, the earlier decisions having been gathered in 16 L.R.A.(N.S.) 691.

Parent and child — failure to furnish food — supply by stranger. Where a father is upon trial, charged with having failed to furnish his child with necessary food and clothing, it is held no defense, in the Oklahoma case of Hunter v. State, 134 Pac. 1134, to show that such food and clothing were not necessary because they were voluntarily furnished by other persons. Recent cases accompany the foregoing decision in L.R.A.1915A, 564, the earlier authorities having been gathered in a note in 32 L.R.A.(N.S.) 841.

Physician — revocation of license — unprofessional conduct. That a statute permitting the revocation of a physician's license for grossly immoral or unprofessional conduct is held not to be invalid, in Aiton v. Medical Examiners, 13 Ariz. 354, 114 Pac. 962, L.R.A.1915A, 691, on the theory that what shall be regarded as unprofessional conduct is too uncertain to constitute a standard, since the language must be interpreted to mean that which is by general opinion considered to be grossly unprofessional because immoral or disreputable.

Pleading — date of injury —limiting proof to date named. The proof, it is held in the Tennessee case of May v. Illinois C. R. Co. 167 S. W. 477, need not show that a personal injury inflicted by a railroad company was sustained on the day named where the complaint alleges that it was on or about that day, and upon motion to make the complaint more certain plaintiff shows that he cannot fix the date of injury with any more definiteness. This case appears from the note accompanying it in L.R.A.1915A, 781, to be in accord with the other authorities on the question, it being generally held that while in an action for injuries on a railroad track the plaintiff should allege the time with such definiteness as to enable the railroad company properly to prepare its defense, he is not required to prove the exact day alleged, or to allege positively a particular day or hour; at least, if unable to do so.

Receiver — direction of sale —elimination of provisions. That provision in a decree directing a receiver to sell railroad property in his hands, which fixes an upset price, should be eliminated when persistent efforts to sell at that price proved futile, and continued operation of the road by the receiver will result in large loss to all concerned, is held in the Indiana case of Union Trust Co. v. Curtis, 105 N. E. 562, annotated in L.R.A.1915A, 699.

School — exclusion of colored child. A constitutional provision requiring the children of the white race and those of the colored race to be educated in separate schools is held to authorize the exclusion from white schools of children having an admixture of negro blood, however remote, in the North Carolina case of Johnson v. Board of Education, 166 N. C. 468, 82 S. E. 832, accompanied by supplemental annotation in L.R.A. 1915A, 828.

School — power to require health certificate from pupil. A novel case was presented in the South Dakota case of Streich v. Board of Education, 147 N. W. 779, L.R.A.1915A, 632, which holds that a school district has authority to compel pupils to present a physician's certificate as a condition to admission to school, although it has not been expressly conferred, and jurisdiction over health matters has been committed by the legislature to the board of health.

Slander — privilege — answer to questions. A statement by the father of one who abandoned his wife, to the father of the latter, who questioned as to the cause of the separation, that the wife was unchaste at the time of marriage, is held not privileged in the Texas case of Davis v. State, 167 S. W. 1108, annotated in L.R.A.1915A, 572.

Street railway — safety devices — use. In operating a motor car and heavy trailer on the public streets of a city, a street car company is held bound, in Gross v. Omaha & C. B. Street R. Co. 96 Neb. 390, 147 N. W. 1121, to use the same degree of care with respect to equipment with safety appliances as is usual in the operation of passenger cars. The duty of a railroad company to equip its cars so as to avoid or minimize injury to persons or criminals on or near the track is the subject of the note appended to the foregoing decision in L.R.A. 1915A, 742.

Tax — municipal property — property used wholly and exclusively for public use. That a revenue, less than the cost of maintenance and interest on investments, is derived from property lawfully owned by a municipal corporation, such as water and gas works, market house and auditorium, is held in the

Virginia case of Com. v. Richmond, 81 S. E. 69, annotated in L.R.A.1915A, 1118, not to prevent its being used wholly and exclusively for city purposes within a constitutional-tax exemption, and make it subject to taxation as being used in competitive business; and it is immaterial that a small quantity of water and gas is furnished consumers outside the city limits.

Timber — failure to remove within time specified — effect. A grant of standing timber under the express agreement that the grantee is to be allowed a certain time and no longer to remove it, is held in the Tennessee case of Bond v. Ungerecht, 167 S. W. 1116, L.R.A. 1915A, 571, to pass a defeasible title which ceases upon failure to remove within the time specified.

Trust — ex maleficio — obtaining property under promise not intended to be kept. A woman who induces her husband to convey property to her without consideration, by a promise that she will hold it in her name and at his death pay certain money to his children by a former wife, with intent not to perform the promise, but to convey the property to her children, is held in the Iowa case of Stout v. Stout, 146 N. W. 474, L.R.A. 1915A, 711, to take as trustee *ex maleficio*, and the trust may be enforced against her and her children if the property has been conveyed to them without consideration.

Recent English and Canadian Decisions

[NOTE.—The more important of these decisions will be reported, with full annotations, in British Ruling Cases.]

Carriers — exemption from liability — whether includes loss occasioned by negligence. Where a carrier attempts by contract to limit his liability, it is often a question whether the words used are wide enough to cover loss occasioned by the negligence of the carrier or his servants. This was the question involved in Joseph Travers & Sons v. Cooper [1915] 1 K. B. 73, where it was held that a term in a contract of lighterage, exempting the lighterman from liability for damage "however caused," relieved him from liability for damage caused by the negligence of his servant. Phillimore, L.J., in discussing the cases as to the sufficiency of the various terms used, says that the distinction on which they turn "seems to be this. If you say 'any loss' you are directing attention to the kinds of losses, and not to their cause or origin, and you have not sufficiently made it plain that you mean 'any and every loss' irrespective of the cause, and therefore you have not brought home to the person who is intrusting the goods to you that you are not going to be responsible for your servants on your behalf, exercising due care for them, or possibly even for your own personal want of care. But if you direct attention to the causes of any loss, if you say 'any loss,' 'however caused,' or 'under any circumstances,' you give sufficient warning, and it is not necessary to say in express terms 'whether caused by my servants' negligence,' or in the bill of lading phrase, 'neglect or default or otherwise.' "

Checks — effect of writing words "to be retained" across face. A person having occasion to give a check, but not having a check book with him, wrote out and signed a form of check on a blank piece of paper. Not wishing a check in that form to pass through his banking account, he wrote upon the face of it the words "To be retained," and promised to send a check in substitution for it. This he failed to do, whereupon the original check was presented, and, being dishonored, action was brought thereon. It was held that the addition of the words "To be retained" merely imported a condition between the drawer and drawee, and did not affect the character of the instrument as a check, so as to preclude the maintenance of the action. Roberts & Co. v. Marsh [1915] 1 K. B. 42.

Contracts — restraint of trade — employer and employee — reasonableness. A covenant by one employed by a concern engaged in the manufacture of a highly specialized form of machinery, that he will not at any time during a certain period from the date of his ceasing to be employed by such concern, within the United Kingdom, carry on or be concerned in the sale or manufacture of the class of machinery made by the concern, or any business connected with it, is held in Morris v. Saxelby, 84 L. J. Ch. N. S. 149, to be too wide, in that it operates to prohibit the employee from using not merely confidential knowledge acquired in the course of his employment, but knowledge forming part of his general mental equipment, although such equipment includes the special skill and experience which he has gained in the course of his employment; Sargant, J., by whom the case was decided, saying that in determining the question of reasonableness he thought that the interest of the employer is not the only element to be considered, but that he should take into account the oppressiveness of the restriction on the servant, particularly from the point of view of the damage done to the public interest by his energies being unduly fettered.

Eminent domain — expropriation of part of golf course — measure of compensation. The Ontario appellate division holds in Re Brantford Golf & Country Club, 32 Ont. L. Rep. 141, that where part of a golf course has been taken by a railroad, a proper measure of compensation is the cost of acquiring sufficient other land to replace such part of the course as has been rendered useless for the purposes of the game.

Executors and administrators — validity of acts of administrator where will is subsequently discovered. That letters of administration granted on the assumption that there was no will are not void *ab initio* where upon the discovery and probate of a will they have been recalled, and that a purchaser of real estate from the administrator therefore acquired good title is held by the English Court of Appeal in Hewson v. Shelley [1914] 2 Ch. 13, reversing a decision previously noted in these columns (issue of January, 1914), and overruling several earlier cases to the contrary.

Gifts — intended marriage — termination of engagement — recovery. A woman who promised to marry a man upon the condition of his absolutely refraining thereafter from the use of intoxicating liquor, and who has terminated the engagement upon the man's breaking his promise, is not bound to return presents made by him to her in prospect of marriage, although she is bound to turn over to him articles purchased with his money, with the view of furnishing a house upon marriage. Seiler v. Funk, 32 Ont. L. Rep. 99.

Homicide — accidental shooting while violating game law. That the fact that a hunter who fired at his comrade, mistaking him for a moose, was violating the law by hunting moose during the closed season, will not warrant a conviction for manslaughter on that ground alone, the wrongful act in the course of which the homicide occurred being not *malum in se*, but only *malum prohibitum*,—is held by a Nova Scotia court in Rex v. Oxley, 23 Can. Crim. Cas. 262.

Railroads — damage done by spread of fire — applicability of limitation statute relating to actions for injuries caused by operation of railway. The injury done to an adjoining property owner by setting out a fire on a railroad right of way for the purpose of burning up old ties, and failing to prevent its spread to his lands, is an "injury sustained by reason of the construction or operation of the railway," within the meaning of a statute imposing a time limit for bringing an action for damages for injury thereby occasioned. Greer v. Canadian P. R. Co. 32 Ont. L. Rep. 104.

Theaters — right of purchaser of ticket — forcible ejection. Although it has long been considered settled law that a ticket of admission to a public place of amusement confers upon the holder a mere license which, though

given for a valuable consideration, is revocable at will, there has been of recent years a tendency to limit the exercise of the right of revocation to cases where there is a violation of the conditions, express or implied, of the contract of admission. This is illustrated by a recent decision of the English court of appeal, which holds that the purchaser of a ticket for a seat at a theater has a right to stay and witness the whole of the performance, provided that he behaves properly and complies with the rules of the management; that the license granted by the sale of the ticket includes a contract not to revoke the license arbitrarily during the performance; and therefore that one who was forcibly turned out of a moving picture show under the mistaken belief that he had not paid his admission is entitled to recover substantial damages in an action for assault and false imprisonment. Phillimore, L. J., however, dissented on the ground that the revocation of the license for other than good cause merely entitled the ticket holder to a return of his money. Hurst v. Picture Theatres [1915] 1 K. B. 1.

War — alien enemy resident in England — right to sue as plaintiff. That an alien enemy as such is not thereby debarred from resorting to the courts for relief during the continuance of the state of war, but while permitted to remain in the country is exonerated from the disability of enemies, occupying the same position as any other foreigner, except as to carrying on trade with the enemy country, is held in Princess Thurn & Taxis v. Moffitt [1915] 1 Ch. 58. And, according to the same case, the fact that the plaintiff is a woman whose husband is actually engaged in hostile warfare does not alter the situation, where the basis of the action is a right individual to herself. It may be pointed out that this case does not affect the question of the right of an alien enemy not resident in England to sue in English courts. Whether he can do so in the absence of any objection by the defendant seems to be open to doubt; though there is authority for the proposition that he cannot, in the face of such an objection, initiate or proceed with an action while the state of hostilities which makes him an alien enemy lasts.

The foregoing decision has been followed in Canada. See Oskey v. Kingston, 32 Ont. L. Rep. 190.

War — right to continue action against alien enemy. An English court has held (citing DeJarnette v. DeGiverville, 56 Mo. 440, and McVeigh v. United States, 11 Wall. 259, 20 L. ed. 80) that there is no rule of common law which suspends an action in which an alien enemy is defendant, and no rule of common law which prevents his appearing and conducting his defense; and therefore that an alien defendant against whom an action is pending at the time war is declared is not entitled to a stay of proceedings during the war. It is suggested, however, that in the event of the defendant succeeding in the action, no order which would entitle him to payment of costs during the war ought to be made, and his right to issue execution ought to be suspended until the cessation of the state of hostilities which makes him an alien enemy. Robinson & Co. v. Continental Ins. Co. [1915] 1K. B. 155.

Wills — bequest of securities "standing in my name" — what included. That a bequest of all the "stocks, shares, debentures, debenture stock, and all other securities which shall be standing in my name at my decease," does not include bonds payable to bearer, and that such bonds were not brought within the description by the fact that they were kept by a bank in an envelop marked with the name of the testatrix, and were entered under the heading of her name in the bank's safe custody register,— was held in Re Mayne [1914] 2 Ch. 115.

The world's a theatre, the earth a stage
Which God and Nature do with actors fill.—Heywood.

Anger Restores Speech. So enraged was a deaf and dumb soap peddler of New Rochelle, New York, when Judge Swinburne fined him $10 for peddling without a license, that he swore. He was so astonished at recovering his voice that he stared wildly at the judge, then without waiting to apologize he threw down a $10 bill, and rushed from the courtroom, shouting and laughing, leaving his pack of soap behind.

Fit — Flit. A negro who has on several occasions had fits in the Dallas city courtroom was called for trial recently.

There was little evidence against him, but as soon as he was led from the cage he began to reel.

"Get out of here. Go on home. Wait until you get outside to have that fit," said Prosecutor Allen.

In the meantime Judge Lee Richardson wrote on his docket, "Case dismissed by reason of contemplation of a fit."

Which Would He Be? A Maine lawyer tells of an inquest held at a certain place in that state, when, after the usual swearing in of the jurors, one of them arose from his seat, and with much dignity protested against serving as a juror, as he was "managing clerk" for a firm of lawyers, and could not waste his valuable time at an inquest. Whereupon the coroner, turning to his clerk, said: "Mr. Jones, kindly hand me 'Jervis.'" Then, after consulting that authority, he turned upon the juror, and fixed him with his glittering eye. "Upon reference to Jervis," said he, "I find that no persons except idiots, imbeciles, and lunatics are exempt from service as jurors. Under which heading do you claim exemption?"

The Motes in His Brothers' Eyes. Colonel Mason, who lives in Washington county, Maine, had a great aptitude for serving as a juror. When thus serving, he was very anxious that his opinion should be largely consulted in making up a verdict. Some years ago, while upon a case, after many hours' trying to agree, but failing, he marshaled the delinquent jury from the room to their seats in the court, where the impatient crowd awaited the result of the trial. "Have you agreed upon a verdict?" inquired the clerk. The colonel arose, turned a withering glance upon his brother jurors, and exclaimed: "May it please the court, we have not; I have done the best I could do, but here are eleven of the most contrary devils I ever had any dealings with."

Business Courtship. An amusing case was once decided in a Frankfort police court. It appears that a cook, no longer quite young, was courted by a tailor somewhat younger than she. On Sundays, and occasionally during the week, the gallant lover was in the habit of taking his lady for extended promenades and visits to restaurants, where the latter always paid the expenses. She also provided him regularly with his supper.

Presently, however, the awful truth was brought home to the cook that she was not the only friend on whom the man of the scissors and the needle lavished his affections. Nothing loth, she

went to the nearest police court, suing the faithless one for all the expenses of the clandestine meals provided by her, and all the money spent when "walking out" with him.

The tailor, however, was once again too much for her. Instead of appearing before the tribunal as a repentant sinner, he came into court with a long bill in his hand, on which an account was given of the time lost from his work while going out with his cook. When the two bills were compared, the difference of £8 was in favor of the tailor, and the lady was ungallantly compelled to pay every penny of it.—Chicago Herald.

Waited Thirty Years to Wed. An extraordinary romance of love is reported from Elbing, where Hermann Hessberg, a slipper maker, has just married a lady to whom he had been engaged for thirty years.

When Hessberg was a young man of twenty-eight, he fell in love and was about to marry. To his chagrin, however,—and we may suppose equally to that of his fianceé,—a wealthy aunt, upon whose financial assistance the lovers had been counting, forbade the marriage under penalty of disinheritance. The ceremony was accordingly postponed, and Hessberg and his bride-elect awaited with what amount of patience they could summon for the removal of the only barrier that still kept them apart.

Before long the aunt died, and the last obstacle to happiness seemed to have been surmounted. But when her will was opened the lovers found that her nephew had been appointed her heir upon one condition. That condition was that he did not marry the lady of his love for at least another thirty years.

This intelligence was communicated to the unhappy girl, and with stoical resignation the lovers settled themselves down to the prospect of a thirty years' courtship.

This period of probation has now expired, and they have become man and wife. The marriage, however, had to take place in the house of the bridegroom, who is confined to his room with a heart complaint.—Berlin cablegram in the St. Louis Republic.

Saved By a Picture. In the summer of the year 1860, one hot night in July, a herdsman with his dog was moving his cattle to a new ranch further north, near Helena, Texas. As he passed down the banks of a stream, his herd became mixed with other cattle that were grazing in the valley, and some of them failed to be separated. The next day about noon, a band of a dozen mounted Texas rangers overtook the herdsman, and demanded their cattle, which they said were stolen. It was before the full rule of laws and courthouses in Texas, and one had better kill five men than steal a mule worth five dollars, and this herdsman knew it. He tried to explain, but they told him to cut his story short. He offered to turn over all the cattle not his own, but they laughed at his offer, and hinted that they usually claimed the whole herd in such cases, and left the thief hanging on the tree (a few days), as a warning to others in like cases.

The poor fellow was completely overcome. They consulted apart a few minutes, and then told him, if he had any explanations to make, or business to do, they would allow him ten minutes to do it, and to defend himself.

He turned to the rough faces and commenced, "How many of you men have wives?" Two or three nodded. "How many of you men have children?" They nodded again. "Then I know who I am talking to, and you'll hear me," said the frightened herdsman who continued: "I never stole your cattle: I have lived in these parts over three years; I came here from New Hampshire; I failed there in the fall of '57, during the panic; I have been saving, I have lived on hard fare; I have slept on the ground; I have no home here. My family remain East, while I go from place to place. These clothes I wear are rough, and I am a hard-looking customer, but this is a hard country. Days seem like months to me, and months like years, and but for letters from home (here he pulled out a handful of well-worn envelops and letters from his wife), I should get discouraged. I have paid part of my debts, here are my receipts (and he unfolded the letters of acknowledgment); I expected to sell out and go home in No-

vember. Here is the testament my good old mother gave me. Here is my little girl's picture," and he kissed it tenderly. "Now, men, if you have decided to kill me for what I am innocent of, send these home, and send as much as you can for the cattle when I am dead. Can't you send half their value? My family will need it." He again kissed the picture. *"Tell them I said I was not guilty. They will believe it."*

"Hold on now—stop right thar," said a rough ranger. "Now I say, boys," he continued, "I say, let him go; he's no cattle thief. That kind of men don't steal. Give us your hand, old boy. That picture and them letters did the business. You can go free, but you're lucky, mind me."

"We will do more than that," said a man with a big heart in Texas garb, and carrying the customary brace of pistols in his belt; "Let's us buy his herd and let him go home now."

They did, and when the money was paid over and the man about to start, he was too weak to stand. The long strain of hopes and fears, being away from home under trying circumstances, and the sudden deliverance from death, had combined to render him as helpless as a child. An hour later, however, he left on horseback for the nearest state route, and as they shook hands when bidding him good-bye, they looked the happiest band of men I ever beheld. So said an eyewitness.—From Judge Donovan's Modern Jury Trials.

Reviewing the Calendar. The presiding judge, writes Thomas Fitch of the Los Angeles Bar, was a learned and able lawyer who possessed a moderate private fortune, and who accepted the position of judge because he liked the work. He was not in the least taciturn, and was not disposed to allow the lawyers to do all the talking. He would "chip in" and participate in any discussion before him with questions, and dissertations, and side-bar remarks, and if the case at bar did not offer opportunities for him, he would refer to other cases. Those lawyers who understood this idiosyncracy of the judge always humored him, and listened patiently until he was through, and would then proceed with the trial of the pending case.

But there was one member of the bar who was annoyed at this practice of the Judge, and who determined to express his objections to it at the first opportunity. One afternoon in August, when the valley of the Gila was seething with heat, and the idlers in Florence were sweltering under the shade of the dirt-roofed piazza which surrounded the old adobe building that served for a courthouse, this attorney, who was employed for the defendant in a noted divorce case, was contending before the judge that the rule of law that the residence of the husband is the residence of the wife did not prevail in an action for divorce brought by a nonresident wife against a resident husband. The counsel paused for a moment in his argument to pour for himself a glass of water. "Mr. Blair," said the court, "I am satisfied that the decision of the supreme court of California is not law. I am satisfied that in an indictment for stealing bullion from a mining company, it is not necessary to state whether the company is an incorporation or a partnership—Go on, Mr. Blair."

The counsel stood quietly and received the interruption. The remarks of his Honor referred to a bullion-stealing case in the trial of which Mr. Blair had participated a week previous. In that case he had vainly endeavored to procure a dismissal of the indictment on the ground now referred to by the Judge, but the jury had subsequently acquitted the defendant, and the case was at an end.

"Go on with your argument, Mr. Blair," said the Judge.

"May it please your Honor," said Blair, "I know that the statute provides that in an action against the administrator of an estate, neither party shall be allowed to testify as to verbal declarations made by the deceased in his lifetime. But I submit that the rule does not apply where the case has been tried once in the lifetime of the deceased, and his testimony was taken down and reduced to writing. In that case it ceases to be a mere verbal declaration, and becomes written evidence. Your Honor will remember the case tried before your

last term in which this interesting question was elaborately discussed. Your Honor will pardon me for this digression, but since the case at bar seems not to interest your Honor, I thought that while we were reviewing all the old and dead cases formerly on the calendar, I might please your Honor by these few remarks."

"The court accepts your explanation Mr. Blair," said the Judge, "and does not wish to interrupt you. Indeed, you are throwing about as much light now on the case at bar as you were when the court interrupted your original argument."

A Chinese Ordinance. Wu Ting-Fang, the former Chinese ambassador to Washington, has written a book on America that has astonished many readers by reason of its wisdom and humanity. The Chinese, however, are a literary race. In China the very ordinances and by-laws are better written than our best sellers.

Proof? Well, here is an ordinance addressed by the governor of Ningpo to the Ningpo farms. It is far above anything that McCutcheon or Porter, Hallie Rivers, or Farnol, could do.

"Frogs are produced in the midst of your fields; although they are little things, they are small human beings in form.

"They cherish a life-long attachment to their native soil, and at night they melodiously sing in concert with clear voices. Moreover, they protect your crops by eating locusts, thus deserving the gratitude of the people.

"Why go after dark with lanterns, scheming to capture the harmless and useful creatures? Although they may be nice flavoring for your rice, it is heartless to kill them. Henceforward it is forbidden to buy or sell them, and those who do so will be severly punished.

"Sparrows, too, sing, at their season sweetly in the trees. They are not like wolves, tigers, or leopards, which may take to injuring men when they grow large. Why go out with nets to catch them from all the woods and hills?

"Know that for the strong to slay the feeble for food is the way of wild beasts and rapacious birds. Resist the desire of your mouths and stomachs for savory meats, and thus act in harmony with heaven, which loves to preserve life.

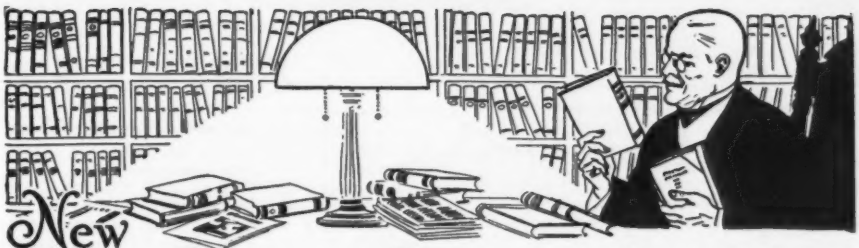
"Both these kind of creatures you are forbidden to catch from henceforth. Do not flatter yourselves that after this warning the punishment for disobedience will be mild."

Lots Drawn for Verdict. A new method of administering justice was invented and applied recently at Villa Franca de Xira, in Portugal. A prisoner was charged with coining, and as the jury were evenly divided and could not agree, they determined to draw lots. Two pieces of paper were procured, one was inscribed "guilty" and the other "innocent." They were then folded and shuffled, and one was then chosen by a juryman. It happened to be the one inscribed "guilty," thereupon the prisoner was sentenced to the maximum penalty, four years' penal servitude and eight years' transportation.—Lisbon Seculo.

Trust Fund for Cleaning Tombstone. Orlando H. Davenport, who left an estate of $500,000, wanted the monument over his grave in Forest Hills Cemetery scrubbed with soap once every year until the end of time. In his will he provides $50 annually for this purpose. Regarding it the will says:

"This must be done in a most careful manner, without the use of lye or acid stronger than common soap, so that all shall be kept clean and free from moss, stains, or dirt."

Work must be done in May every year "forever." The four headstones in the lot must be cleaned in the same manner.—Boston Transcript.



New Books and Recent Articles

A man will turn over half a library to make one book.—Johnson

"The Rights and Remedies of Creditors Respecting Their Debtor's Property." By Garrard Glenn (Little, Brown & Co., Boston), $3.

The aim of this volume is to harmonize, as far as possible, the various statutes and doctrines relating to the rights of creditors respecting their debtor's property so as to demonstrate the system afforded by our jurisprudence for the realization of debts. The author has not attempted an exhaustive discussion of any particular branch of the general subject, but rather devoted his work to the novel task of synthesis,—to a study of the system as a whole, and of the relation which each part bears to the others.

The author is well qualified to deal with his topic, having delivered a special course of lectures thereon at the Law School of Columbia University, and having published various articles on the subject. The work is attractively prepared and well worthy of perusal.

"A Pocket Code of the Rules of Evidence in Trials at Law." By John H. Wigmore. Massachusetts Edition by Charles N. Harris, with Federal Citations by John Simpson (Little, Brown & Co., Boston).

This volume, prepared with especial reference to the law of evidence in Massachusetts, is the first of a proposed series of local editions, completely annotated, for those jurisdictions having voluminous authorities. Its object is to provide the practitioner with a handy summary of the existing rules of evidence, and to state them in a scientific form capable of serving as a code.

Frequent reperusal of this concise manual will enable the student or lawyer to impress the rules of procedure upon his memory, and make him an expert trial practitioner. It will prove a convenient source of reference, if memory fails. Its system of copious cross-references, illustrations, and distinctions, under the various rules, enable the trial lawyer to test the applicability of other rules to different aspects of the offered fact.

In its aspect as a code, the work is not offered as a proposal for legislation, but as an attempt to present in that way a concise and practicable statement of the law of evidence in scientific form.

The work is one the Massachusetts bar will appreciate.

"The Law of Arrest." 2d ed. (Revised and enlarged) By Harvey Cortlandt Voorhees. 12 mo. Limp Leather, $3.

"Derby's Cases on Criminal Law." Buckram, $4.

"Whitehouse's Equity Practice, 1914." (With forms). 3 Vols. Buckram, $22.50.

"The Federal Trade Commission." (With explanatory notes). By Rush C. Butler and Cornelius Lynde. Paper, $1.

"Burns's Indiana Digest." Vol. 3. Buckram, $10.

"Cumulative Kentucky Digest." Vol. 3. Buckram, $7.50.

"Durfee's Cases on Mortgages." Buckram, $4.

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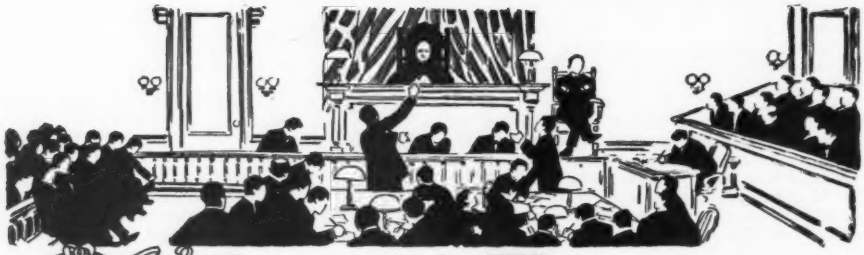


Judges and Lawyers

A Record of Bench and Bar

Frank O. Loveland

An Appreciation

THERE passed out of this life, Monday morning, February 1, 1915, one of the most useful officials that has ever served either the bench or bar in the government employ.

Frank Olds Loveland was born at Norwich, Vermont, December 12, 1861. He graduated from Dartmouth College in the class of 1886, with honors. He began the study of law in Cincinnati, in the office of Parkinson & Parkinson, and entered the Cincinnati Law School, from which he graduated in 1888. He practised law in Cincinnati until 1894, when, on the organization of the United States circuit court of appeals of the sixth circuit, at the personal solicitation of the then Judge Wm. H. Taft, the presiding judge, he accepted the clerkship of this court, which office he held until his death.

HON. FRANK O. LOVELAND

It was a matter of special pride to Mr. Loveland to feel that the various judges who have sat on the bench in this court were his personal friends; and it was his pleasure to realize that aside from official association, always congenial, he could count as his personal friends such men as President Taft, Justice Day, and Justice Lurton, who passed from service as judges of this circuit to higher spheres of usefulness. His help to the members of the bar who practised in the court of appeals of the sixth circuit cannot be measured, for it was always dignified and intelligent, and was given with the earnest desire to be of service to the court he served

with such ardent devotion. The books that he prepared and which were published at once took rank as the best on the subjects they treated, and will always be a monument to his memory.

His cheerful disposition under most trying circumstances, his admiration for the high ideals of his profession, his helpfulness to those who came to him for advice, will always be a cherished memory to those who knew him.

Our readers will recall the valuable article on the question whether judgments for personal injuries are provable claims in bankruptcy, which Mr. Loveland contributed to the February, 1914, "Bankruptcy" number of Case and Comment.

Decease of Retired Texas Jurist.

Judge T. S. Reese died in Bryan, Texas, on February 10, at the age of sixty-nine years. He was one of the most distinguished jurists of that state, and until a few weeks ago was one of the associate justices of the court of civil appeals, first supreme judicial district, when he was forced to resign because of ill health. He was born in the little town of Selma, Alabama, Feb. 2, 1844, and received his early education in that village and at Dallas Academy, the principal educational institution of Dallas county, of which Selma was the county seat. Still a very young man at the outbreak of the Civil War, he enlisted as a soldier under the Confederate flag, and served gallantly until peace was declared. Shortly after the close of the war he left his old home at Selma, and in 1868 settled at Hempstead, Texas, where he built a home that he retained up to the time of his death.

Judge Reese took up the practice of law at Hempstead, and soon developed into an able lawyer with a large clientele. In 1892 he first sought public office, being elected as judge of his district, where he served for one term, and was re-elected, but resigned and entered into private law practice at Houston. In Houston he again built up a large practice in a short time, but again entered public service as assistant attorney general under Attorney General Smith, which post he retained when C. K. Bell was elected as head of the department, and again when R. V. Davidson entered upon his administration of the office. In 1905 Judge Reese resigned his place in the attorney general's department to become associate justice of the first supreme judicial district court of civil appeals, in Galveston, in which position he served until his recent resignation. He was known to the legal profession throughout the state, and was held in high esteem by reason of his clear-sighted judgment and authoritative written opinions. He was president of the Texas Bar Association in 1903 and 1904.

Death of Judge Seaman.

Judge William H. Seaman, of the United States circuit court of appeals, seventh circuit, died on March 8, at Cornado, Cal. Owing to ill health Judge Seaman has not sat on the bench since the January session.

In 1893 President Grover Cleveland appointed Judge Seaman United States district judge of the eastern district of Wisconsin. April 11, 1905, he was appointed to the Federal court of appeals for the seventh circuit.

Judge Seaman was born in 1842, at Sheboygan, Wisconsin, where he has lived all his lifetime. After serving in the Civil War, he took up the practice of law until he was appointed to the bench. From 1893 to 1898 he was president of the Wisconsin State Bar Association. As a jurist, the deceased has a splendid record. He has taken part in preparing many important legal opinions, and his writings have always been clear, logical, and classic.

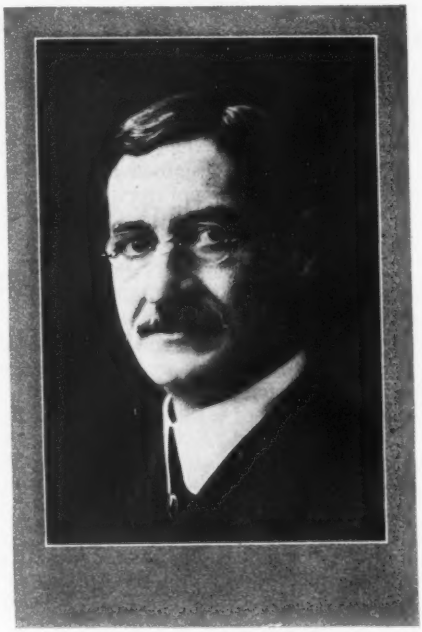
Judge Carroll Cook.

Carroll Cook, for many years superior judge in San Francisco, and one of the prominent attorneys of that city, died on January 8. He was sixty years of age.

Judge Cook was one of the leading attorneys of San Francisco, and gained a high reputation through his work in criminal cases. He was first assistant

United States attorney for the local district from 1884 to 1888, under S. J. Hildorn, and was judge of the superior court from 1897 to 1909.

On leaving the bench Judge Cook returned to private practice, and soon was engaged as counsel for the Chinese Six Companies. In that capacity he became thoroughly conversant with Chinese affairs, and was considered one of the best informed men on these matters. One of the first cases which brought him into prominence was the well-known McNulty murder case, resulting in a victory for Cook and his client after a sensational legal battle. More recently he was successful before the state supreme court in obtaining an opinion that petitions for parole of state prisoners must be received after one year of imprisonment.



F. S. BRITTAIN

Prominent San Francisco Lawyer.

Frank S. Brittain, general attorney for the Panama-Pacific International Exposition, like Gaul, the friend of our high school days, is divided into three parts. He is first of all a humorist, plus an analysist, plus an exposition booster and enthusiast. The sum of the three makes him a most interesting and delightful individual.

An exposition is, as it were, a legal clearing house; that is, it contains, and is in touch with, every phase of human endeavor. And as long as we deal with human endeavor, we inevitably deal with law. In consequence, the department which is headed by Mr. Brittain is indeed a complex one. Mr. Brittain has been said to be in the position of "feeling the pulse of the Universe." I am sure that the keen sense of humor possessed by Mr. Brittain helps him out many, many times in dealing with the multitudinous questions which are brought before him.

Frank S. Brittain was born in Philadelphia, Pennsylvania, and came to San Francisco for the Mid-winter Fair of 1894. Like many others he became entranced with our climate and remained with us. He is an attorney and, with the exception of one year during the Spanish-American war and one year after the war, he has devoted himself to practising his profession in San Francisco. Prior to his admission to the bar, he had been educated as a civil engineer. During the war of 1898 he was commissioned, by Congress and President McKinley, to act as one of three in a specially appointed army board of engineers. His rank was that of a first lieutenant.

The battalion to which he was attached had no service on the firing line, but spent over a year in the Hawaiian Islands. During the entire period of Lieutenant Brittain's service as a military engineer, he was detailed on duties in which he was required to act as a lawyer. The efficient combination of the two professions made him an invaluable asset to the army corps.

Returning to his legal profession in San Francisco, he, early in 1910, was asked to organize the law department of the Panama-Pacific International Exposition, and was then made its general attorney.

Hang sorrow! care will kill a cat,
And therefore let's be merry.—Wither.

Difficult. A man was brought before the court upon the complaint of his wife, says the Berliner Illustrirte Zeitung: While the prisoner was testifying, the judge made it clear that he intended to be harsh with him; so his wife became frightened, and, when called to the stand, refused to give any testimony. In fact, she retracted all her accusations.

"So your husband didn't strike you then?" said the judge, "Where did you get that black eye?"

"I struck it accidentally on the mantel-piece."

"So! And that piece bitten out of your ear,—he didn't do that, either?"

"No, no, your Honor, I did that myself!"

A Surprise. A darkey named Dick was known as a notorious thief, so much so, in fact, that all the thefts in the neighborhood were charged to him. Finally one man had all his turkeys stolen, and he had Dick arrested.

"You stole Mr. King's turkeys?" asked the judge.

"Well," said Dick slowly, "I'll tell you, sir, I didn't steal dem turkeys, but last night I went 'cross Mr. King's pasture, and saw one of my rails on de fence; so I jes' brought it home, and, confound it! when I come to look, dar was nine turkeys settin' on de rail."

Indifferent. "Guilty, or not guilty?" said a judge to a native of the Emerald Isle. "Just as yer honor plazes. It's not for the loike o' me to dictate to yer Honors worship," was the reply.

Ordered Home? "I give you my word, the next person who interrupts the proceedings," said the judge sternly, "will be expelled from the courtroom and ordered home."

"Hooray!" cried the prisoner, and the judge pondered.

A Matter of Deduction. Sherlock Holmes glanced 'round the room. The pictures were torn into shreds—the chairs were broken—the table lying on the top of the piano. A great splash of blood was on the carpet.

"Someone has been here," he commented with wonderful insight.

Speaking in Parables. "Pa, what is a retainer?" "What you pay a lawyer before he does any work for you, my son." "Oh, I see. Its like the quarter you put in the gas meter before you get any gas."—Boston Transcript.

No Lawgivers. "Pa," said Johnny, who is a persistent knowledge seeker, "what is a lawgiver?"

"There ain't any such thing, Johnny," replied the old gentleman, who had been involved in considerable litigation in his time.

"But this book says that somebody was a great lawgiver," persisted the youngster.

"Then its a mistake," rejoined the father. "Law is never given. It's retailed in mighty small quantities at mighty high figures."

The Real Party in Interest. A colored minister was having us draw a subscription to stock in an Afro-American corporation, states an Arizona lawyer. We were stating the object of the corporation as being to "conserve" the sav-

ings of the colored people. By a strange bull the typewriter said "coon"-serve the said savings. When the preacher saw it he laughed as only the colored man can laugh. All hands agreed that the typewriter told the truth.

A Terrible Mistake. W. G. Means, of the Concord, North Carolina, bar, is well known as a lawyer and as a yarn spinner. He went to New York city last summer, and after he had returned he was in a group of attorneys under the shade of the courthouse trees, when someone told an anecdote about a hotel clerk, and made the point that a good clerk could instantly size up the guest and know the kind of room he wanted, without asking any questions.

Colonel Means smiled, and then told this: "I guess that is true, but I fooled one in New York last week. I got there tired and dirty and unshaved, and my collar was limp and black, and I looked pretty much like a tramp. I registered and the clerk told the bellboy to take me to 937, a room on the ninth floor back without a bath. I went up and then found a bath room, bathed, put on clean clothes, went down the back way, got a shave and shine, and walked in the front door just ahead of a new crowd of guests. I went up to the clerk and asked him if he could give me a good room.

"Sure," he said, "number fifteen, on the first floor, the best room in the house."

"All right," I replied, "please send up to 937 and have my baggage brought down there. You made a h—l of a mistake a while ago."

Waiting. A Cleveland police magistrate was examining a prisoner brought into court on the charge of stealing a ride on a railway train.

"Where were you?" asked his Honor, referring to the prisoner's former place of abode.

"In St. Joe, Missouri," was the reply, "I was waiting."

"Waiting for whom?"

"Just waiting."

"What were you waiting for?"

"To get my money."

"From whom?"

"The man I was waiting for."

"What did he owe it for?"

"For waiting."

"See here," exclaimed the justice, thinking the joke had gone far enough, "what is all this about?"

"Oh, your Honor," said the man, "I thought you knew what I meant,—I was waiting in a restaurant."

Reasonable. Lord Esher, who when president of the English Court of Appeal used to keep up a running fire of chaff on learned counsel, sometimes got a Roland for his Oliver, as when a young barrister in the course of argument stated that no reasonable person could doubt one particular proposition.

"But I doubt it very much," said the judge.

The youthful advocate, not one whit abashed, replied, "I said no reasonable person, my Lord."

The master of the rolls could only gasp, "Proceed, sir, proceed."—London Express.

Blarney the Morning After. Here is one that was told by Congressman Edward W. Pou, of North Carolina, at a recent banquet where the topic switched to the inevitable Pat.

The esteemed Patrick, so related the congressman, went to the depot to meet a relative that he hadn't seen for several years, and the result was great happiness.

Pat being muscular, the police force had much trouble in convincing him that he ought to be the guest of the city, but finally he was placed in the municipal rest.

"Shure, judge," remarked Pat, when he was haled before the magistrate the next morning, "if yez will be so kind as to forget it Oi'll do as much for yezsilf sometoime."

"Let me see," reflectively responded the magistrate. "You are the man who gave the officers so much trouble. I understand it took seven of them to lock you up."

"Yis, yer Honor," innocently admitted Pat, "but it would take only wan to let me out."—Philadelphia Telegraph.